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## Escape Clause Relief in the EEC and the United States: Different Approaches to the Dilemma of Adjustment to a New World Trading Environment

Thomas A. Behney, Jr. \*

The world trading system today features a great deal of uncertainty and pressure for greater protection of national industries.<sup>1</sup> Nations are being asked to ensure that local industries will not be overwhelmed by a flood of imports. At the same time, most trading nations have signed on to the General Agreement on Tariffs and Trade<sup>2</sup> (GATT) that limits the amount and kind of protection a nation may grant to local industries. Thus, nations are somewhat constrained in their ability to respond to the political pressures created by manufacturers seeking relief. The general rule in GATT prohibits nations from penalizing imports and restricting their free flow across national boundaries.

One of the exceptions to the general rule in GATT is a provision allowing a nation to impose penalties on imports if a domestic industry is either threatened with or is currently experiencing serious injury as a result of increased quantities of those imports. This section of GATT is often referred to as the escape clause.<sup>3</sup> The escape clause allows nations to enact rules which enable them to avoid their obligations under GATT.

Both the European Economic Community (EEC) and the United States have established rules for an escape clause. The two systems differ both in the way the statutes and regulations are worded and in the way that they are applied. The distinctions between them and

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<sup>1</sup> See M. Langley, *Protectionist Attitudes Grow Stronger in Spite of Healthy Economy*, Wall St. J., May 16, 1988, at 1, col. 6. According to a poll cited in the article, a majority of Americans now believe that a country's economic power is more important than military power in determining the country's status in the world. See also D. GREENAWAY, *TRADE POLICY AND THE NEW PROTECTIONISM* (1983).

<sup>2</sup> General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

<sup>3</sup> *Id.*, art. XIX.

the relative merits of each system take on increased importance as the world's trading nations attempt to achieve the delicate balance between the political pressures for increased protection of domestic industries and the desire for the benefits of an open world trading system.

This Article analyzes escape clause legislation and cases in both the EEC and the United States. The Article first discusses the basic framework for trade regulation, as presented in GATT. The Article then considers EEC regulations and cases, followed by a discussion of the U.S. escape clause statute and cases. The Article then analyzes the strengths of both systems and the provisions in each system that would be most useful in the current world trade environment.

## I. Framework Under GATT

International rules of trade are governed to a large degree by GATT. Founders of GATT intended that it would serve as a mechanism for reducing tariffs and barriers to trade and for eliminating discriminatory treatment of products in international commerce.<sup>4</sup> The general thrust of GATT is the lowering of barriers to trade. However, within the general framework of an open trading system, GATT does provide exceptions to the general rule of lower tariffs and nondiscriminatory treatment of imports. GATT allows an exception when a particular industrial sector in a country is threatened with or is presently suffering from serious injury as a result of imports.<sup>5</sup> Article XIX of GATT states:

If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this agreement, including tariff concessions, any product is imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.<sup>6</sup>

The EEC Member States and the United States, as GATT signatories, are bound to follow this standard if they wish to apply sanctions against imports.<sup>7</sup> If either finds that a domestic industry is threatened with or is experiencing serious injury, it may impose sanctions.<sup>8</sup> These sanctions normally consist of increased tariffs or

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<sup>4</sup> *Id.*, preamble.

<sup>5</sup> *See id.*, art. XIX.

<sup>6</sup> *Id.*, art. XIX, § 1(a).

<sup>7</sup> In fact, the regulation of this area in the Member States and the United States closely tracks Article XIX. *See infra* notes 12-28 and accompanying text, and notes 146-97 and accompanying text.

<sup>8</sup> GATT, *supra* note 2, art. XIX.

quotas, and GATT allows these sanctions to stay in place until the injury is "prevented" or "remedied."<sup>9</sup>

The United States originally proposed including this article within GATT as a way of accommodating countries with a domestic industry that suffered as a result of tariff concessions. This set of circumstances is no longer necessary for a finding that escape clause relief is appropriate.<sup>10</sup> In essence, GATT has recognized the value of having a safety valve (the escape clause) on the international trading system to release some domestic political pressure.

## II. The European System

The EEC trade policy mirrors that of GATT: the underlying principle is the free circulation of imports.<sup>11</sup> The EEC deviates from this principle when necessary to prevent serious injury to an EEC industry. If serious injury occurs or threatens an EEC industry, the EEC can impose safeguards.

### A. EEC Regulations

The current regulations governing the imposition of safeguards are outlined in Council Regulation (EEC) No. 288/82.<sup>12</sup> This regu-

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<sup>9</sup> *Id.* It is generally accepted that relief is applied in a nondiscriminatory fashion in these cases. See E. MCGOVERN, *INTERNATIONAL TRADE REGULATION* 292 (1986). A number of scholars in Europe, however, question this principle, and the EEC itself has not always applied the principle. See, e.g., Bronckers, *The Non-Discriminatory Application of Article XIX of GATT: Tradition or Fiction?*, 7 *LEGAL ISSUES EUR. INT.* 35 (1981/82).

<sup>10</sup> That is, there is no need to link the serious injury or threat of serious injury to a tariff concession made under GATT negotiations.

<sup>11</sup> See GATT, *supra* note 2, art. XI; see also Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 113(1), 298 U.N.T.S. 11, 60 [hereinafter Treaty of Rome].

<sup>12</sup> 25 O.J. EUR. COMM. (No. L 35) 1 (1982) [hereinafter Regulation 288/82], amended by Council Regulation (EEC) No. 571/86, 29 O.J. EUR. COMM. (No. L 56) 67 (1986) (amending, on account of the accession of Spain and Portugal, Annex I of Regulation (EEC) No. 288/82 on common rules for imports), and Council Regulation (EEC) No. 1243/86, 29 O.J. EUR. COMM. (No. L 113) 1 (1986) (amending Regulations (EEC) No. 288/82, (EEC) No. 1765/82 and (EEC) No. 1766/82 on common rules for imports). Regulation 288/82 replaced Council Regulation No. 926/79, 22 O.J. EUR. COMM. (No. L 131) 15 (1979). Regulation 288/82 superseded the previous regulation covering safeguard measures to provide the Community with "more precise criteria for assessing possible injury," to adopt a new investigative procedure, and to meet the "desire for simplicity and greater transparency of import arrangements" in the EEC. See Regulation 288/82, *supra*, preamble. The earlier regulations which considered fairly traded imports were Regulation (EEC) No. 1439/74 of the Council, 17 O.J. EUR. COMM. (No. L 159) 1 (1974), Council Regulation (EEC) No. 1025/70, 13 O.J. EUR. COMM. (No. L 124) 6 (1970), and Council Regulation 2041/68, 11 O.J. EUR. COMM. (No. L 303) 1 (1968). Regulation 288/82 does not cover textile imports or imports from nonmarket economies, which are considered in other regulations. Regulation 288/82, *supra*, art. 1, para. 1. See Council Regulation (EEC) No. 1765/82, 25 O.J. EUR. COMM. (No. L 195) 1 (1982) (control of fairly traded imports from nonmarket economies); Council Regulation (EEC) No. 1766/82, 25 O.J. EUR. COMM. (No. L 195) 21 (1982) (regulation of fairly traded imports from the People's Republic of China). Imports from Cuba are also regulated separately.

These regulations do not preclude Member States from limiting imports on the grounds of public policy, morality, security, health and safety, foreign exchange reasons,

lation gives the Community the power to protect domestic industry against serious injury or the threat of serious injury caused by increasing imports.<sup>13</sup> The regulations encompass three basic procedures for safeguarding EEC industries: investigation, surveillance, and the institution of protective measures.

### 1. Investigation

The investigation process is triggered by information from a Member State to the Commission or by self-initiation of the Commission.<sup>14</sup> After receipt of a petition or motion by the Commission, an Advisory Committee is formed to conduct a preliminary hearing (called a consultation) and to determine whether an investigation is necessary.<sup>15</sup>

In the information submitted to the Commission, Member States must include import trend data covering import volumes, import prices, and the substantial injury caused by imports.<sup>16</sup> If the Member State alleges the threat of serious injury to the domestic industry because of imports, the submission must also contain information on the potential effect if these products enter the EEC in increased quantities.<sup>17</sup>

Information on import volumes considers absolute numbers of imports, and the relative and absolute market share of imports.<sup>18</sup> The second element, import prices, is concerned mostly with price undercutting.<sup>19</sup> The third element, substantial injury caused by imports, relates to the impact on EEC producers of increased imports of the like product.<sup>20</sup> The analysis of EEC producers focuses on do-

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or other treaty obligations. See Council Regulation (EEC) No. 1243/86, 29 O.J. EUR. COMM. (No. L 113) 1 (1986).

The legal basis for the regulation is Article 113 of the Treaty of Rome. Treaty of Rome, *supra* note 11, art. 113.

<sup>13</sup> The starting point for these regulations is the same as GATT: the ideal is the liberalization of imports with no quantitative restrictions. Regulation 288/82 allows the EEC to take measures to protect domestic industry if there is any "danger created by trends in imports." See Regulation 288/82, *supra* note 12, preamble.

<sup>14</sup> *Id.*, arts. 3, 4. Member States can inform the Commission if the trend of imports of a particular article seems to require surveillance or protective measures. *Id.*, art. 3.

<sup>15</sup> The Advisory Committee is made up of representatives from each Member State and is chaired by a Commission representative. *Id.*, art. 5, para. 1. The Advisory Committee discusses the information presented and possible remedies. *Id.*, art. 3, para. 2.

<sup>16</sup> See *id.*, art. 9, para. 1.

<sup>17</sup> See *id.*, art. 9, para. 2.

<sup>18</sup> *Id.*, art. 9, para. 1(a).

<sup>19</sup> *Id.*, art. 9, para. 1(b). The EEC looks at a price comparison between the imported product and the domestic product. *Id.* At the U.S. International Trade Commission there has been a great deal of discussion about the validity of these comparisons. See Certain Welded Carbon Steel Pipes and Tubes from Taiwan, USITC Pub. 1994, Inv. No. 731-TA-349 (Final) at 63-79 (July 1987) (Additional Views of Vice-Chairman Anne E. Brundsdale).

<sup>20</sup> Regulation 288/82, *supra* note 12, art. 9, para. 1(c). The regulation actually looks at the producers of "similarly or directly competitive products." *Id.*

mestic industry trends, such as production, capacity utilization, stocks (inventory), sales, market share, price suppression or depression, profits, return on capital, cash flow, and employment.<sup>21</sup> If the Commission is investigating the threat of substantial injury, the information submitted includes data on the rate of increase of imports, the export capacity of foreign producers, and the likelihood that this capacity will end up in the EEC.<sup>22</sup> If, after receiving this data, the Advisory Committee decides that an investigation is warranted, the Commission announces and initiates an investigation.<sup>23</sup>

The Commission begins the investigation by considering the claims made in the petition.<sup>24</sup> The Commission gathers additional information on import trends and prices, as well as the state of the domestic industry.<sup>25</sup> Any interested party is invited to participate.<sup>26</sup> After it concludes its investigation, the Commission sends a report to the Advisory Committee.<sup>27</sup> After consulting with the Advisory Committee, if the Commission determines that surveillance or protective measures are not appropriate in the case, the Commission publishes a notice that the investigation is closed.<sup>28</sup> The Commission also has the option of imposing surveillance on the product's entry into the EEC or instituting protective measures to neutralize the effects of the imports.

## 2. Surveillance

If the Commission determines that continued entry of a product into the EEC presents a substantial threat of serious injury to EEC producers, it can order that product placed under surveillance.<sup>29</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*, art. 9, para. 2.

<sup>23</sup> *Id.*, art. 6, para. 1. The investigation is announced in the OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES. *Id.*

<sup>24</sup> *Id.*, art. 6, para. 2.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*, art. 6, para. 4. Any party may present a written submission to the Commission. *Id.*, art. 6, para. 1(a). If a party can show that he has special reasons for appearing before the Commission, he may be allowed to do so. *Id.*, art. 6, para. 4.

All information gathered by the Commission during its investigation that is deemed confidential may not be revealed by the Commission without the express approval of the provider. *Id.*, art. 8. In general, governmental bodies attempting to collect this kind of business information need to guarantee confidentiality to ensure the ease of gathering information. See Anthony & Byrne, *Confidential Information in ITC Injury Proceedings*, 17 L. & POL'Y INT'L BUS. 1-69 (1985).

<sup>27</sup> Regulation 288/82, *supra* note 12, art. 7, para. 1.

<sup>28</sup> *Id.*, art. 7, para. 2.

<sup>29</sup> *Id.*, art. 10, para. 1. The statute allows prior and retrospective surveillance. Prior surveillance means that the importer can introduce the product into the EEC only upon production of an import document. *Id.*, art. 11, para. 1. Retrospective surveillance allows surveillance a little further back in the past. The Community also allows retrospective surveillance if the Community wants to impose surveillance in conjunction with some other form of restraint on the product. See, e.g., Commission Regulation (EEC) No. 418/87, 30 O.J. EUR. COMM. (No. L 42) 25 (1987) (introducing retrospective Community

Products under prior surveillance can be introduced into the EEC only upon production of an import document, but there is no limit on the amount that can be shipped into the EEC.<sup>30</sup> Member States must report all imports of the product under surveillance on either a monthly or quarterly basis.<sup>31</sup> Surveillance can be imposed for a period up to twelve months, and can be renewed.<sup>32</sup>

Either a Member State or the Commission can request that an Advisory Committee consider whether a product should be taken off the surveillance list.<sup>33</sup> In response to such a request, the Advisory Committee considers the effects of surveillance and whether its application is still necessary.<sup>34</sup> The Commission will then decide whether to amend or revoke the surveillance based on the consideration by the Advisory Committee.<sup>35</sup> A list of the products under surveillance is published every year in early February. This list contains all products and the countries within the Community for which those products are under surveillance.<sup>36</sup>

In a few instances, products are under surveillance throughout the entire EEC.<sup>37</sup> However, most products are under surveillance only in selected countries. The countries with the most products under surveillance are France, Spain, and Portugal. Among the products under surveillance by these three countries are horses for slaughter, chocolate, coffee, oil cakes, petroleum oil, vulcanized rubber, antisera and vaccines, reconstituted wood, silk yarn, cotton waste, cold-rolled or cold-finished iron and steel bars and rods, unwrought manganese waste and scrap, nonelectric industrial and labo-

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surveillance of imports of urea originating in third countries). The surveillance information includes a detailed description of the product and the country of origin, the country of shipment, the CCT heading, quantity, and value for customs purposes. Finally, the Community allows temporary surveillance for a shorter period of time than retrospective or prior surveillance. *See, e.g.*, Commission Regulation (EEC) No. 1245/87, 30 O.J. EUR. COMM. (No. L 117) 17 (1987) (introducing temporary Community surveillance prior to importation of certain products originating in Japan).

<sup>30</sup> Regulation 288/82, *supra* note 12, art. 11, para. 1, and art. 13. Unless other factors are specified by the Commission or Member States, the import document should contain the following information: (1) name and address of the importer; (2) description of the product, including commercial description, tariff heads, country of origin, and the exporting country; (3) quantity of the product and price, indicated at CIF price free-at-frontier; and (4) proposed date and place of importation. *Id.*, art. 11, para. 2.

<sup>31</sup> *Id.*, art. 14.

<sup>32</sup> *See id.*, art. 10, para. 3. *See, e.g.*, Commission Regulation (EEC) No. 3966/87, 30 O.J. EUR. COMM. (No. L 371) 55 (1987). This regulation extended surveillance of video tape recorders from South Korea for a full year.

<sup>33</sup> Regulation 288/82, *supra* note 12, art. 18, para. 1.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*, art. 18, para. 2.

<sup>36</sup> *See, e.g.*, List of Products Subject to Surveillance, 30 O.J. EUR. COMM. (No. C 37) at 45 (1987) (updating of the 1982 NIMEXE Code of Annexes I and II to Council Regulation (EEC) No. 288/82 of 5 Feb. 1982 on common rules for imports (situation on 1 Jan. 1987)).

<sup>37</sup> For example, carnations and roses (CCT heading number 06.03 A I, A II) are under surveillance throughout the EEC. *Id.* at 46. Socks and stockings (CCT Heading 60.03) are also under surveillance throughout the EEC. *Id.* at 55.

ratory ovens, and microphones.<sup>38</sup>

Surveillance is used extensively in the EEC,<sup>39</sup> and has certainly proved to be a valuable tool in defusing trade tensions at an early stage. Surveillance places a very slight burden on the importer, allowing unrestricted imports of the product.<sup>40</sup> Surveillance can be implemented by the Community without much delay. The benefits are fairly extensive. It appears that importers realize surveillance is a warning that they have reached the acceptable level of imports and any greater amount carries the risk of harsher sanctions.<sup>41</sup> At the same time, the review mechanism prevents EEC Member States from abusing the process. The regulation orders the Advisory Committee to keep surveillance in place only as long as its effect is necessary.<sup>42</sup> Surveillance allows the EEC to react to domestic pressures without placing a great deal of pressure on the international trading system.

### 3. *Protective Measures*

If the Commission determines that there is serious injury to the domestic industry, it can implement protective measures to protect EEC manufacturers.<sup>43</sup> These measures apply to all imports into the EEC, but can be limited to imports into certain regions if a limitation is desirable.<sup>44</sup> Protective measures can be implemented immediately in critical situations.<sup>45</sup>

The Council has responsibility to act on the imposition of protective measures recommended by the Commission.<sup>46</sup> The Council's responsibility is "to prevent a product being imported into the Com-

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<sup>38</sup> *Id.* at 46.

<sup>39</sup> In 1987, over 300 products were under surveillance. *Id.*

<sup>40</sup> The only burden on the importer is the burden of complying with the reporting requirements, which is not that significant; given the number and extent of documents already required in international trade transactions.

<sup>41</sup> In fact, it appears that importers respect these limits. No examples of a product under surveillance which subsequently was the subject of an investigation for a protective measure were found.

<sup>42</sup> Regulation 288/82, *supra* note 12, art. 18, para. 1.

<sup>43</sup> At one point EEC Member States could implement protective measures unilaterally, but their power to do so has been removed by the Commission. See COM(86) 708 Final, Regulation submitted to the Council by the Commission.

<sup>44</sup> Regulation 288/82, *supra* note 12, art. 15, para. 3.

<sup>45</sup> *Id.*, art. 15, para. 1. If the Commission determines that the situation is "critical" and that "any delay would cause injury which . . . would be difficult to remedy," it can immediately adopt the sanctions specified in article 16. *Id.* The Commission can do this on its own motion or at the request of a Member State. *Id.* The Commission reports its decisions regarding sanctions to Member States and the Council. *Id.*, art. 15, para. 5. Within one month, a Member can refer the decision to the Council. *Id.* The Council, at that point, must confirm, amend, or revoke the decision of the Commission by qualified majority. *Id.*, art. 15, para. 6. If the Council does not act on a referral within three months, the decision by the Commission to adopt or not to adopt protective measures is revoked. *Id.*

<sup>46</sup> *Id.*, art. 15, para. 1. The Council votes on the recommendation, with a qualified majority necessary to adopt any measure. *Id.* Qualified majority voting is a weighted average voting scheme in the EEC.



munity in such greatly increased quantities and/or on such terms or conditions as to cause, or threaten to cause, substantial injury to Community producers of like or directly competing products."<sup>47</sup> No particular method of restraint is mandated, so any appropriate remedy may be implemented.<sup>48</sup>

The most popular method of relief, and the only relief specifically mentioned in the regulations, is the imposition of quotas.<sup>49</sup> If a quota is used, the EEC will attempt to maintain "traditional trade flows."<sup>50</sup> In establishing a quota, the Commission will also take into account the volume of goods exported under contracts before the institution of protective measures and the "need to avoid jeopardizing achievement of the aim pursued in establishing the quota."<sup>51</sup> Protective measures are not directed at a specific country; they apply to all products imported into the Community.<sup>52</sup> The Council may, however, limit protective measures to the imports intended for certain regions of the Community.<sup>53</sup>

Protective measures have no time limit, but can be rescinded or amended.<sup>54</sup> The Commission or a Member State can request that the Advisory Committee study the effect of the protective measure and whether its continuation is still necessary.<sup>55</sup> Following consultation with the Advisory Committee, the Commission determines whether the protective measure should be amended or revoked.<sup>56</sup> If the Commission makes an affirmative decision and if the Council has acted on the protective measure, the Council then needs to act on the revocation or amendment.<sup>57</sup> If the Commission acted alone on the protective measure, as in the case of critical circumstances, the Commission itself decides to amend or revoke the protective measure.<sup>58</sup> The absence of any right of appeal to the judicial system reinforces that the process is a political one and not a standard administrative proceeding. The regulations in this area are very straightforward and are comparable to the rules of the U.S. system.

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<sup>47</sup> *Id.*, art. 16, para. 1(a).

<sup>48</sup> *See id.*, arts. 15, 16.

<sup>49</sup> *See, e.g., infra* notes 97-102 and accompanying text; *see* Regulation 288/82, *supra* note 12, art. 15, para. 2.

<sup>50</sup> Regulation 288/82, *supra* note 12, art. 15, para. 2. That is, the EEC will set up quotas based on market shares held by foreign producers over a period of several years, and will discount any recent surges in imports from any country.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*, art. 15, para. 3(a).

<sup>53</sup> *Id. See also infra* notes 96-102 and accompanying text. Products already en route to the Community which cannot be shipped elsewhere are exempt. Regulation 288/82, *supra* note 12, art. 15, para. 3(b).

<sup>54</sup> *See* Regulation 288/82, *supra* note 12, art. 18.

<sup>55</sup> *Id.*, art. 18, para. 1.

<sup>56</sup> *Id.*, art. 18, para. 2.

<sup>57</sup> *Id.*, art. 18, para. 2(a). Any Council decision to change a protective order must be by qualified majority. *Id.*

<sup>58</sup> *Id.*, art. 18, para 2(b).

### *B. European Safeguard Cases*

Several examples illustrate the use of this process. Two cases in which protective measures were implemented will be examined, as well as a case where the Commission found no serious injury or threat of serious injury.

#### *1. Watches*

The first of these safeguard cases concerned electronic quartz display watches.<sup>59</sup> The case originated from a French Government request for a safeguard proceeding concerning watches from Japan, Hong Kong, Taiwan, Macao, and South Korea.<sup>60</sup> The vast majority of imports under investigation were from these five countries. The discussion of the case started with analysis of the product under investigation as well as the parameters of the domestic industry.<sup>61</sup> First, the Commission had to decide which products in the EEC were directly competitive with the imported watches under investigation. The Commission easily determined that digital watches compete with each other.<sup>62</sup> The Commission then considered the question of whether domestic analog and imported digital watches were like products and determined that products having the same uses, or which are basically interchangeable, compete directly.<sup>63</sup> Both kinds of watches have the same uses, are commercially interchangeable, and have essentially the same parts.<sup>64</sup> Therefore, they are like products.

The Commission then sought to define the domestic industry, which consisted of all EEC manufacturers of the like or directly competing product.<sup>65</sup> Within the Community, France, West Germany,

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<sup>59</sup> See Commission Regulation (EEC) No. 1087/84, 27 O.J. EUR. COMM. (No. L 106) 31 (1984) (introducing protective measures in respect of certain electronic piezo-electric quartz watches with digital display) [hereinafter *Watches*].

<sup>60</sup> This case actually had a long and contentious history, even before the French Government request to initiate a safeguard proceeding. Prior to the request for safeguards, the French Government had set quotas on the importation of watches from Hong Kong. Hong Kong protested these quotas because it believed they were illegal under GATT, and requested that a GATT panel examine the legality of the quotas. See Eur. Rep. No. 894 (Oct. 6, 1982). The GATT panel determined that the French quotas were illegal, which led the French Government to attempt to restrict imports under the safeguard procedure. The EEC agreed to investigate the French complaint on October 23, 1983. During a portion of the period of investigation, the French Government was allowed to suspend imports under Article 115 of the Treaty of Rome. The whole case was also controversial within the EEC, with West Germany taking a free-trade position and France demanding protection. See Eur. Rep. No. 1011 (Jan. 18, 1984).

<sup>61</sup> *Watches*, *supra* note 59, at 32.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 33.

and the United Kingdom had producers of the like product.<sup>66</sup> The producers in the United Kingdom only made parts and subassemblies and were not considered further by the Commission.<sup>67</sup> The industries in West Germany and in France were very different from each other. The West German industry was heavily concentrated in clock-making production, while the French industry focused on watches.<sup>68</sup> Because the producers in these two countries were so different, the Commission decided to study each country's producers separately.<sup>69</sup>

The Commission utilized trend analysis to monitor the changes in the volume of imports, consumption, and prices over a period of four years.<sup>70</sup> Imports of quartz digital watches into the Community increased from 36.7 million units in 1980 to 45.1 million units in 1982.<sup>71</sup> Between 1980 and 1982, the number of imports into the EEC increased at an annual rate of 12.2%.<sup>72</sup> The Commission estimated that domestic consumption of the product in the EEC stabilized at between 63 and 65 million watches annually,<sup>73</sup> which meant that the market share of imports increased from 64.3% to 83.3% between 1980 and 1982.<sup>74</sup> Imports into France increased from 4.5 to 9.6 million units, an average annual increase greater than 20%.<sup>75</sup> Import market share in France increased from 33.9% to 67.7% between 1979 and 1983.<sup>76</sup> Imports into West Germany increased from 8.6 to 20.3 million units, an annual average increase of 25%.<sup>77</sup> This increased the market share of imports in West Germany from 47.6% to 84% between 1979 and 1983.<sup>78</sup>

While the average price of quartz watch imports remained stable, the price of imported liquid crystal display (LCD) watches, already much lower than the price of domestically produced watches, dropped even further.<sup>79</sup> The Commission found evidence of significant undercutting of prices between watches from Hong Kong, Taiwan, South Korea, Macao, and China on the one hand, and watches from France.<sup>80</sup> The price differences ranged from 12.1% to

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<sup>66</sup> *Id.* Italy also has a watchmaking industry, but it is "craft-based" rather than a true manufacturing operation, and was not included within the scope of the investigation. *Id.*

<sup>67</sup> *Id.* Additionally, there was only one producer in the United Kingdom.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 33-35.

<sup>71</sup> *Id.* at 33. Imports for the first half of 1983 amounted to 22.3 million units. *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* Estimated market share in 1983 was 88.6%. *Id.*

<sup>75</sup> *Id.* at 34.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 35. Between 1980 and the first half of 1983, the price of all imports went up slightly, while the price of LCD watches dropped by 60%.

<sup>80</sup> *Id.*

77.4%.<sup>81</sup> The Commission also found significant undercutting of up to seventy-five percent between the price of West German analog watches and imported digital watches.<sup>82</sup>

The Commission then analyzed the domestic industry, looking at sales, market share, firms, work force, and financial data. During the period 1975 to 1983, French production dropped from 15 to 7.9 million units.<sup>83</sup> French producers' share of the home market dropped from 55.7% in 1979 to 22.9% in 1983.<sup>84</sup> The number of firms in the industry decreased from 82 to 65, and the number of workers fell from 4900 to 4000.<sup>85</sup> During the same period, almost all French producers incurred an increase in operating losses.<sup>86</sup> The Commission determined that the French industry was suffering substantial injury.<sup>87</sup>

In West Germany, production of watches dropped from 5.9 to 3.1 million units between 1980 and 1983, a drop of 46.6%.<sup>88</sup> German market share of West German producers dropped from twenty percent to ten percent over the same period.<sup>89</sup> German firms surveyed by the Commission cut employment by 52.1% percent between 1980 and 1983.<sup>90</sup> Financial data obtained from West German producers revealed losses over the period and a deteriorating financial position.<sup>91</sup> The Commission therefore determined that the West German industry was also suffering substantial injury.<sup>92</sup> These analyses led the Commission to the conclusion that the domestic industry was suffering substantial injury.

The Commission proceeded to examine any causal link between imports and the injury to the domestic industry.<sup>93</sup> It determined that a stable market, combined with increasing import penetration and significantly lower import prices, proved that imports were responsible for the substantial injury suffered by the domestic industry.<sup>94</sup> The Commission found no other cause that could explain the injury to the domestic industry.<sup>95</sup> When considering the interests of the

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 36.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* Losses increased from 3.8% to 11.4% of sales between 1980 and 1983.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 37.

<sup>95</sup> The Commission examined imports of mechanical watches into the EEC to determine whether they could be a cause of substantial injury. *Id.* The Commission found that imports of these watches *fell* over the period and, in fact, the absolute number of imports of these watches had never been large enough to cause substantial injury to the domestic

EEC, however, the Commission determined that West German producers had already taken steps to insulate their firms from the effect of imports. Therefore, protective measures would be implemented only in France and not in West Germany.<sup>96</sup>

The Commission determined that the most effective method of relief would be the imposition of quotas on imports of these watches into France. The quota for each importing country would be based in part on an average of the last three years of its imports into France.<sup>97</sup> For Hong Kong, the largest supplier, the quota would be based on a longer period to reflect trade flows more accurately.<sup>98</sup> These quota levels would increase annually by five percent<sup>99</sup> and would remain in effect for three years.<sup>100</sup> Following the final decision by the Commission, the West German Government appealed to reverse the decision and remove the quotas.<sup>101</sup> The Council, however, rejected the West German appeal and confirmed the Commission regulation instituting the quotas.<sup>102</sup>

## 2. Stoneware

The second case concerned pottery and stoneware with the request again coming from the French Government.<sup>103</sup> Following con-

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industry. *Id.* The Commission also considered whether LCD watches created a new market distinct from the analog watch market, and should not be included in the injury analysis. There were large sales of LCD watches, but a shift in demand was responsible for the increased sales of these watches. *Id.* at 38. The Commission determined that demand for these watches was essentially demand for a cheap watch and not demand for a new technology. *Id.* In addition, the Commission found the flat demand for all watches in Europe to be very telling—the introduction of LCD watches did not create demand for a new product. Instead, LCD watches replaced sales of other watches. *Id.* The Commission concluded that imports were responsible for the substantial injury and these other factors played only a small role in causation. *Id.*

<sup>96</sup> *Id.* at 38-39. The Commission noted that the French Government had requested relief. *Id.* at 38. The German Government did not request relief. The German producers were divided as to the usefulness of relief, and the German industry was not as dependent on watchmaking for revenue as the French industry. Additionally, the German industry already had taken successful steps to restructure and reduce its dependency on watchmaking. The geographic area in which the German watchmaking industry was located was much more economically vibrant than the area where the French industry was located. *Id.* at 38-39. Therefore, the Commission decided to apply protective measures only in France. *Id.* at 39.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 40.

<sup>101</sup> Eur. Rep. No. 1045 (May 26, 1984).

<sup>102</sup> See Council Regulation (EEC) No. 1830/84, 27 O.J. EUR. COMM. (No. L 172) 1 (1984) (confirming Commission Regulation (EEC) No. 1087/84, 27 O.J. EUR. COMM. (No. L 106) 31 (1984) introducing protective measures in respect of certain electronic piezo-electric quartz watches with digital display).

<sup>103</sup> See Commission Regulation (EEC) No. 3528/82, 25 O.J. EUR. COMM. (No. L 369) 27 (1982) (introducing protective measures in respect of imports into France and the United Kingdom of tableware and other articles of a kind commonly used for domestic or toilet purposes, or stoneware, and terminating the Community investigation procedure in

sultation with the Advisory Committee, the Commission decided to initiate an investigation.<sup>104</sup> These imports were coming primarily from South Korea and Taiwan.<sup>105</sup> In defining the like product, the Commission decided that pottery and stoneware should be considered separately because of differences between the products.<sup>106</sup> The Commission noted that pottery imports had not risen substantially and that their market share was fairly low and stable.<sup>107</sup> The Commission determined that any injury caused by these products was not material and that there should be no protective measures imposed.<sup>108</sup>

The Commission reached a different result on stoneware. Stoneware imports increased dramatically between 1977 and 1982.<sup>109</sup> In addition, the share of the Community market taken by these imports rose from 20.8% in 1977 to 51.7% in 1981.<sup>110</sup> The Commission also found evidence that resale prices of imports were as much as sixty-seven percent lower than domestic prices.<sup>111</sup> The Commission also noted that stoneware production in the Community remained stable at roughly 30,000 tons while Community consumption jumped from 33,433 tons in 1977 to 58,974 tons in 1981.<sup>112</sup> Most stoneware producers in the EEC lost money in 1981 and in the first half of 1982, and fifteen percent of jobs in the Community industry were lost between 1979 and 1982.<sup>113</sup> The Commission found that producers in France and the United Kingdom suffered serious injury as a result.<sup>114</sup> Without analysis, the Commission determined that no factor other than increased imports could have caused this serious injury, and proceeded to consider remedies.<sup>115</sup>

The Commission determined that injury was serious enough to justify safeguards in France and the United Kingdom and that this case presented critical circumstances which would permit the imme-

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respect of articles of common pottery) [hereinafter Stoneware]. The discussion in this case was not as extensive as that in the previously discussed case. This case was the first one brought under the new regulations, which may explain the brevity.

<sup>104</sup> See 25 O.J. EUR. COMM. (No. C 144) 3 (1982) (notice of initiation of a Community procedure for investigating the trend of imports of tableware and other articles of a kind commonly used for domestic purposes, of common pottery or stoneware, originating in certain third countries, the terms under which those articles are imported and the effects of said imports on Community production).

<sup>105</sup> *Id.*

<sup>106</sup> See Stoneware, *supra* note 103, at 27-28.

<sup>107</sup> *Id.* at 28.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* Imports rose from 6,965 tons in 1977 to 30,517 tons in 1981, and to 13,540 tons in the first half of 1982. *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 28-29.

<sup>115</sup> *Id.* at 29.

diate imposition of sanctions.<sup>116</sup> To avoid EEC sanctions, the South Koreans attempted to negotiate voluntary restraint agreements (VRAs) with the French and the British to resolve the dispute. The Commission rejected that approach because it fell outside the procedures established in Regulation 288/82, which limited the selection of "defensive measures" to Community authorities.<sup>117</sup> The Commission decided to set quota ceilings based on both volume and value for imports into France and the United Kingdom.<sup>118</sup> The restraints were to be in effect from January 1, 1983, to December 31, 1985.<sup>119</sup>

Following the imposition of sanctions, negotiations continued between the South Koreans and the EEC.<sup>120</sup> As a result of these negotiations, the Commission revoked the sanctions and replaced them with automatic authorization of imports into France and the United Kingdom based on the negotiated levels.<sup>121</sup> The negotiated quota levels were scheduled to last until December 31, 1985.<sup>122</sup>

France complained about the possibility of deflection of trade within the EEC because the quotas were proposed only for imports into the United Kingdom and France. The French alleged that as a result, South Korean imports were entering other parts of the Community and were re-exported to France, thus circumventing the quota. The Commission authorized France to conduct a surveillance of all stoneware entering the country to prevent this.<sup>123</sup> No further action was taken in this case.

### 3. *Glass*

There have been cases where the Community did not institute protective measures. For example, in 1985 Greece requested an investigation of imports of glass into Greece.<sup>124</sup> The Greek Government claimed that imports of glass from Spain, Turkey, and

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* The levels would be based on the average value and volume of imports for 1979, 1980, and 1981. *Id.* The level in France was 7,130 tons, with an annual value of up to 12.26 million European Currency Units (ECU). In the United Kingdom, the level was 4,935 tons with an annual value of up to 6.05 million ECU. *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> The South Koreans were the main exporters of the product.

<sup>121</sup> See Commission Regulation (EEC) No. 873/83, 26 O.J. EUR. COMM. (No. L 96) 8 (1983).

<sup>122</sup> *Id.*

<sup>123</sup> See Commission Decision, 26 O.J. EUR. COMM. (No. L 247) 8 (1983) (authorizing the French Republic to introduce intra-Community surveillance in respect of imports of tableware and other articles of a kind commonly used for domestic or toilet purposes, of stoneware, originating in South Korea).

<sup>124</sup> See 28 O.J. EUR. COMM. (No. C 66) 12 (1985) (notice of initiation of a Community proceeding to investigate the trend of imports into Greece of certain categories of glass whether figured or not, the conditions under which these articles are imported and the effects of the said imports on Community production).

Yugoslavia were increasing and could cause serious injury to the Greek industry.<sup>125</sup> Imports of glass into Greece increased dramatically between 1982 and 1984.<sup>126</sup> Total imports rose from 2,458 tons in 1982 to 10,793 tons in the first 8 months of 1984.<sup>127</sup> Imports from the 3 countries under investigation increased from 288 tons to 7,193 tons during the same period.<sup>128</sup> The market share of non-Community imports into Greece increased from 3.5% in 1980 to 31% in the first 8 months of 1984.<sup>129</sup> The production of the sole Greek producer declined precipitously over the period, resulting in depressed financial results and a decline in employment.<sup>130</sup> Greece also alleged margins of price undercutting ranging from twenty percent to thirty percent.<sup>131</sup> After consultation with an Advisory Committee, the Commission decided to investigate the case.<sup>132</sup>

Following its investigation, the Commission determined that other factors explained the difficulties the Greek manufacturer experienced.<sup>133</sup> The Commission investigation confirmed Greek allegations that imports of non-Community producers rose sharply between 1981 and 1984 and that undercutting was occurring in the Greek market.<sup>134</sup> The Commission also agreed that the Greek producer suffered serious injury in this case because production fell sharply, facilities were closed, inventories grew, capacity utilization dropped, and market share decreased.<sup>135</sup> However, the Commission determined that a number of factors were responsible for the injury to the domestic industry and therefore was unable to conclude that increasing imports caused the serious injury.

The Commission began its analysis by noting that the Greek industry's decline started before the market share of imports increased

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 13.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* Production dropped from 65,137 tons in 1980 to 27,237 tons in the first 11 months of 1984. *Id.* Of the Greek manufacturer's sales, 98.5% were in the Greek market. *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See 29 O.J. EUR. COMM. (No. C 128) 7 (1986) (notice of termination of the Community proceeding to investigate the trend of imports into Greece of certain categories of glass whether figured or not, the conditions under which these articles are imported and the effects of said imports on Community production). The Commission divided its investigation into two parts—one focusing on wired or figured glass, the other focusing on drawn and float glass. *Id.* at 8.

<sup>134</sup> *Id.* Imports of wired or figured glass rose from 0.4% of the Greek market to 18.9% in 1984. *Id.* Nearly all of the non-Community imports were from Turkey. Market share of imports of drawn and float glass increased from 1.4% to 21.5% between 1981 and 1984. *Id.* These imports mostly were from Spain and Yugoslavia. *Id.* The Commission found price undercutting ranging from 7% to 41%. *Id.* at 8-9.

<sup>135</sup> *Id.* at 9.



dramatically.<sup>136</sup> In addition, several other factors caused harm to the Greek glass industry.

First, imports from the rest of the Community increased substantially over the period.<sup>137</sup> Second, the market share of imports from non-Community producers (other than Spain, Turkey, and Yugoslavia) increased from 3.3% to 18.3% during the same period.<sup>138</sup> Third, consumption of glass in Greece dropped significantly over the period of investigation, and by 1984, domestic consumption of wired and figured glass represented only twenty percent of the Greek industry's annual capacity.<sup>139</sup> Consumption of drawn and float glass remained stable over the period, but again Greek producers' capacity far exceeded demand. In fact, over the period of investigation, the Greek producers did not, at any time, approach the capacity utilization necessary to break even financially in the drawn and float glass industry.<sup>140</sup> Fourth, market demand was shifting to technologically more complex glass, a product Greek producers were not equipped to manufacture.<sup>141</sup> Fifth, the Greek government instituted price controls that limited the price that manufacturers could receive for glass products.<sup>142</sup> The set prices were below the cost of production and certainly contributed to the producers' financial losses.<sup>143</sup> Finally, glass imports into Greece were already subject to antidumping duties and protective measures under the EEC Treaty.<sup>144</sup> Because of all the mitigating circumstances, the Commission determined that causes other than imports were the substantial cause of injury to the domestic industry. In addition, other mechanisms were already in place to deal with any effect of unfair imports from these coun-

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<sup>136</sup> *Id.*

<sup>137</sup> The market share of EEC imports of drawn and float glass increased from 16.4% to 28.6% between 1981 and 1984. *Id.*

<sup>138</sup> *Id.* This analysis, separating imports by country instead of considering all imports as a whole, seems contrary to the procedure for considering all imports from outside the Community in a safeguard case that was established in Regulation 288/82. Regulation 288/82, *supra* note 12. The Commission later addressed this issue by noting that an analysis including all non-Community imports would not have changed their conclusion dramatically. 29 O.J. EUR. COMM. (No. C 128) at 10-11 (1986).

<sup>139</sup> *Id.* at 10. Consumption dropped from 10,380 tons to 6,011 tons between 1981 and 1984. The annual capacity of the Greek producer over that period was 27,000 tons. *Id.*

<sup>140</sup> *Id.* The break-even point was estimated to be a capacity utilization rate of 70%. The highest capacity utilization rate achieved during the period was 60%. *Id.*

<sup>141</sup> *Id.* There was a marked shift in demand to float glass and away from drawn glass. *Id.* The producer may have exacerbated his problems by investing in a drawn glass manufacturing line instead of a float glass line in 1980. *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> See Commission Decision 86/36 (EEC), 29 O.J. EUR. COMM. (No. L 51) 73 (1986) (accepting undertakings entered into in connection with the antidumping proceeding concerning imports into Greece of certain categories of glass originating in Turkey, Yugoslavia, Romania, Bulgaria, Hungary, and Czechoslovakia, and terminating the investigation); see also Commission Decision 85/594 (EEC), 28 O.J. EUR. COMM. (No. L 373) 9 (1985) (protective measures Greece may undertake to stabilize its balance of payments).

tries.<sup>145</sup> Therefore, the Commission concluded that no surveillance or protective measures were required.

It is interesting to note that these cases normally involve only one or two countries in the EEC. This fact indicates that economic integration has not yet occurred in the EEC and that pressure on restricting imports still comes from Member States and industries within those states. In addition, the cases and requests for surveillance more often come from southern European countries. Nonintegration of most industries is still present in the EEC, and the level of competitiveness among industries in the different Member States is still uneven. The reported decisions of cases contain the bare minimum in terms of detail and analysis. The analysis used in these cases offers the reader little guidance on the development of law in the EEC. The opinions leave unclear the controversial areas with which the Commission is dealing. The reader gets no indication of development in the law or policy or even the use for which the Community should put protective measures. The reports of cases make it clear that the Commission is reporting only the facts of the case and not the reasoning behind its decision.

### III. U.S. Escape Clause Laws

The U.S. Government has the power to investigate and to implement protective measures under its version of the escape clause. It thus has two of the three powers for safeguarding national industries that the EEC has. The escape clause relief in the United States is administered by the International Trade Commission (ITC or Commission).<sup>146</sup> The Commission's power to investigate is triggered by a petition for relief filed by a private party, a request from certain sections of the U.S. Government, or on the Commission's own motion.<sup>147</sup> The private parties eligible to file a petition include trade associations, manufacturing firms, and a certified or recognized union or group of workers which is representative of an industry.<sup>148</sup> Governmental officials able to trigger an action include the President, the U.S. Trade Representative, the House Ways and Means Committee, and the Senate Finance Committee.<sup>149</sup>

The purpose of the investigation is "to determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat

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<sup>145</sup> 29 O. J. EUR. COMM. (No. C 128) at 11 (1986).

<sup>146</sup> See 19 U.S.C. § 2251 (1988).

<sup>147</sup> *Id.* § 2252(a)(1), (b)(1)(A).

<sup>148</sup> See Internal Combustion Engine Forklift Trucks from Japan, USITC Pub. 2082, Inv. No. 731-TA-377 (Final), at 55-58 (May 1988) (Additional Views of Vice Chairman Anne E. Brundsdale).

<sup>149</sup> 19 U.S.C. § 2252(a)(1), (b)(1)(A) (1988). The request from either congressional committee is made in the form of a resolution.

thereof, to the domestic industry producing an article like or directly competitive with the imported article."<sup>150</sup> The process followed by the ITC is broken into two stages. At the first stage, the ITC determines whether a domestic industry is seriously injured or is threatened with serious injury.<sup>151</sup> If the ITC makes an affirmative finding on that point, it then explores various options for remedies and sends its proposal to the President.<sup>152</sup> Both stages include a public hearing and opportunities for interested parties to comment and submit written and oral testimony.

In determining whether there is serious injury, the ITC must first define the like product and the appropriate domestic industry.<sup>153</sup> The Commission is statutorily limited in the way it defines the domestic industry. First, in cases where the domestic producers also import, the ITC can include within its definition of domestic industry only the domestic production of such producers.<sup>154</sup> Second, the Commission may consider a particular geographic region of the United States only if that region receives the bulk of imports and is responsible for a substantial portion of domestic production.<sup>155</sup> The ITC then looks at the volume of imports and determines whether there has been an increase of imports, either actual or in relation to domestic production.<sup>156</sup> In addition, the Commission must analyze the share of the domestic market held by domestic producers.<sup>157</sup>

The Commission must next consider whether the domestic industry has been seriously injured or threatened with serious injury because of imports.<sup>158</sup> The statute does not define "serious injury" or "threat of serious injury." However, the statute does list a number of factors that the Commission should consider in making this determination. If the petitioner claims that the industry has been seri-

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<sup>150</sup> *Id.*

<sup>151</sup> *See id.* § 2252(b)(2)(A). The Commission is required to make a decision within 120 days.

<sup>152</sup> Only those Commissioners who voted affirmatively on the issue of serious injury or the threat of serious injury are eligible to vote on the appropriate remedy for the domestic industry. *Id.* § 2252(e)(6). If the Commission determines, by majority vote, that there is no serious injury or threat of serious injury, the Commission does not enter the second phase of the investigation. The entire investigation, from institution to final report to the President, has a statutory limit of 180 days. *Id.* § 2252(f). The anticipated length of the second stage of the investigation is 60 days.

<sup>153</sup> This process is similar to the EEC process. "Like product" means an article like or directly competitive with the imported article. *Id.* § 2251(a).

<sup>154</sup> *Id.* § 2252(c)(4)(A). The Commission may consider only the U.S.-based production of the manufacturer of the like or directly competitive article. This is becoming more difficult as manufacturers increasingly ignore political boundaries in making production decisions, thus leading to globalized manufacturing.

<sup>155</sup> *Id.* § 2252(c)(4)(C).

<sup>156</sup> *Id.* § 2252(c)(1)(C). There has been some controversy over this point in the past. Commissioner Liebler argued that the Commission need only examine actual figures. *See infra* notes 223-24 and accompanying text.

<sup>157</sup> 19 U.S.C. § 2252(c)(1)(C) (1988).

<sup>158</sup> *Id.* § 2252(b)(1)(A), (c)(1)(A), (c)(1)(B).

ously injured, the Commission must consider, among other factors: (1) any significant idling of productive facilities in the domestic industry; (2) the inability of a number of firms in the industry to operate at a reasonable level of profit; and (3) significant unemployment or underemployment within the industry.<sup>159</sup>

If the petitioner claims a threat of serious injury, the Commission must consider five factors. These factors are: (1) any decline in sales or market share; (2) a higher and growing inventory; (3) the extent to which firms in the domestic industry are unable to generate adequate capital to finance the modernization of their domestic plants and equipment, or are unable to maintain existing levels of expenditures for research and development; (4) the extent to which the U.S. market is the focal point for the diversion of exports of the article concerned by reason of restraints on exports of such article to, or imports of such article into, third country markets;<sup>160</sup> and (5) a downward trend in domestic production, profits, wages, or employment.<sup>161</sup>

In addition, the Commission must determine whether imports are a substantial cause of serious injury to the domestic industry. Imports must be a cause of the serious injury, and they cannot be any less important than any other cause of injury to the domestic industry.<sup>162</sup> In looking at serious injury, the Commission must consider the condition of the domestic industry over the course of the relevant business cycle.<sup>163</sup> During this stage of the investigation, the Commission must hold a public hearing, at which all interested parties can present testimony and evidence in support of their position.<sup>164</sup>

An effort has been made to recast the escape clause relief section of the statute as a section dedicated to positive adjustment.<sup>165</sup> Industries may now submit their plans for adjustment to import competition to the Commission during the investigation.<sup>166</sup> The

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<sup>159</sup> *Id.* § 2252(c)(1)(A). When determining whether imports are a substantial cause of serious injury or threat of serious injury, the Commission must consider an increase in imports and a decline in the proportion of the domestic market supplied by domestic producers. *See id.* § 2252(c)(1)(C).

<sup>160</sup> *Id.* § 2252(c)(1)(C)(iii).

<sup>161</sup> *Id.* § 2252(c)(1)(B). The Senate bill contained two provisions on threat which were not enacted into law: the existence of foreign export targeting, and the existence of outstanding preliminary or final antidumping and countervailing duty determinations. *See S.* 306, 100th Cong., 2d Sess. § 1 (1988).

<sup>162</sup> 19 U.S.C. § 2252(b)(1)(B) (1988).

<sup>163</sup> *Id.* § 2252(c)(2)(A). In considering general economic conditions that might affect an industry's performance, the Commission cannot aggregate the causes of declining demand associated with a recession or economic downturn in the U.S. economy into a single cause.

<sup>164</sup> *Id.* § 2252(b)(4).

<sup>165</sup> In fact, the title of this part of the statute has been changed to "Positive Adjustment by Industries Injured by Imports." *See id.* § 2251.

<sup>166</sup> *See id.* § 2252(a)(4).

petitioner may submit such plans at the time the petition is filed or within 120 days of filing.<sup>167</sup> In addition, if the Commission reaches an affirmative determination on injury, domestic firms, unions or recognized groups of workers, state and local governments, domestic industry trade associations, or any other person or group of persons may submit to the Commission commitments they intend to make in order to adjust to import competition.<sup>168</sup> As the legislative history accompanying the law indicates, Congress believed that it was important for firms and workers to show a commitment to positive adjustment to imports and not just to expect protection from competition.<sup>169</sup>

The second stage of the Commission's escape clause proceedings involves selection of the appropriate remedy for recommendation to the President. Any remedy can be recommended, but the remedy selected should be that action which would best address and help resolve the specific injury suffered by the domestic industry.<sup>170</sup> Examples of appropriate remedies include tariffs, quotas, adjustment assistance for workers and firms, tariff-rate quotas, and orderly marketing agreements.<sup>171</sup> Again, the Commission holds a public hearing and conducts a staff investigation.<sup>172</sup> Those Commissioners who determined that there was a serious injury or threat of serious injury are able to vote on the appropriate remedy to recommend to the President.<sup>173</sup> This phase normally lasts sixty days.

The explanation of the Commission's views on the case and suggested remedies, as well as any dissenting or separate views, are included in a report which is sent to the President.<sup>174</sup> The report includes the Commission's determination on all factors required by the statute and the reasoning behind its findings.<sup>175</sup> The Commission will also include in the report any adjustment plan submitted by interested parties, as well as information gathered by the Commission on plans that firms and workers in the industry have made to adjust to import competition.<sup>176</sup> In addition, the report includes an analysis of the effect of pursuing the recommended remedy on the petitioning domestic industry, other domestic industries, and consumers, as well as the effect of *not* pursuing the recommended rem-

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<sup>167</sup> The petitioner can have the U.S. Trade Representative or any appropriate federal agency review the plan's adequacy. *Id.* § 2252(a)(5)(A).

<sup>168</sup> *Id.* § 2252(a)(6)(B).

<sup>169</sup> See Omnibus Trade and Competitiveness Act, Conference Report to Accompany H.R. 3, H.R. Rep. No. 100-576, 100th Cong., 2d Sess., at 663 (1988).

<sup>170</sup> 19 U.S.C. § 2252(e)(1) (1988).

<sup>171</sup> *Id.* § 2252(e)(2)(A)-(E).

<sup>172</sup> *Id.* § 2252(e)(5)(A).

<sup>173</sup> *Id.* § 2252(e)(6).

<sup>174</sup> *Id.* § 2252(f). This report must be sent to the President within 180 days of the institution of the escape clause case by the Commission.

<sup>175</sup> *Id.* § 2252(f)(2)(A), (B).

<sup>176</sup> *Id.* § 2252(f)(2)(E), (F).

edy on the petitioning domestic industry, its workers, the communities where domestic production facilities are located, and on other domestic industries.<sup>177</sup>

*A. Action by the President*

After the President receives the report from the Commission, he is required to take all appropriate action to "facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs."<sup>178</sup> By statute, the President is required to consider the following: (1) the Commission's report and recommendations; (2) the level of participation by workers and firms in retraining efforts, manpower programs, and other forms of adjustment assistance; (3) efforts by the domestic industry to adjust to import competition, including adjustment plans; (4) the probable effectiveness of the relief chosen; (5) short- and long-term social and economic costs and benefits; (6) factors relating to national economic interest (including the economic and social costs borne by taxpayers, communities, and workers if relief were not provided), effects of relief on consumers and domestic consumption, and any effects on other U.S. industries due to compensation; (7) the extent to which the United States is a market for diverted foreign goods; (8) potential for circumvention of any remedy; (9) national security interests of the United States; and (10) other factors the Commission considers in making its remedy recommendations.<sup>179</sup>

The remedies available to the President include additional duties, tariff-rate quotas, quantitative restrictions, adjustment measures including adjustment assistance, orderly marketing agreements, auction quotas, initiating international negotiations to alleviate underlying problems, submitting legislative proposals, and any other appropriate action or a combination of the above.<sup>180</sup> The President has sixty days to determine what kind of relief, if any, is appropriate.<sup>181</sup> Remedies may be enacted for up to eight years.<sup>182</sup>

When the President takes action, he must notify Congress. If he

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<sup>177</sup> *Id.* § 2252(f)(2)(G). This requirement was added by the 1988 Act.

<sup>178</sup> *Id.* § 2253(a)(1)(A).

<sup>179</sup> *Id.* § 2252(a)(2). The other factors that the Commission considers include the form and amount of relief necessary to prevent or remedy the injury or threat, the commitment to adjustment actions pledged by interested parties, any information on conditions of competition in domestic or world markets, and the usefulness of international negotiations to resolve the injury or help in the adjustment process. *See id.* §§ 2252(e)(5)(B), 2253(a)(2).

<sup>180</sup> *Id.* § 2253(a)(3).

<sup>181</sup> *Id.* § 2253(a)(4). The President can, within 15 days, request supplementary information from the Commission. The Commission has 30 days to provide the information and the President then has 30 days to complete the action. *Id.* § 2253(a)(5).

<sup>182</sup> *Id.* § 2253(e). The President can recommend that relief remain in effect for eight years or less. If he recommends that the period of relief be less than eight years, the relief

decides to take no action or action different than that recommended by the Commission, Congress, by enacting a joint resolution within ninety days, can nullify the President's recommendation and have the Commission's recommendation take effect.<sup>183</sup>

### *B. ITC Monitoring*

The Commission has a very active monitoring program under the statute. Any remedy imposed by the President or Congress must be reported on by the Commission every two years starting with the second anniversary of the date of implementation of the remedy.<sup>184</sup> The Commission is charged with monitoring developments of how firms and workers in the industry are adjusting to import competition. If the Commission receives a request from the President, the Commission shall also consider the probable economic effect of extension, reduction, modification, or termination of the relief.<sup>185</sup>

### *C. Changes in Relief After Enactment*

Under certain circumstances, the President can terminate, modify, or reduce relief granted under the escape clause. First, the President must have the report on the probable economic effects of the change from the Commission.<sup>186</sup> Second, the President must seek advice from the Secretaries of Labor and Commerce on the effect of the change.<sup>187</sup> Third, the President must determine that either the domestic industry has not made adequate efforts to adjust to import competition, or the remedy selected has not been effective because of changed economic conditions. The President must indicate the changed circumstances that would support a reduction or termination of relief.<sup>188</sup> The President can also reduce, modify, or terminate relief if a majority of the domestic industry petitions him to do so.<sup>189</sup>

### *D. Relief on Perishable Goods*

Domestic industries that produce perishable agricultural products are entitled to special relief under the new trade law. The anticipated relief is granted quickly. Within twenty-one days of receipt of a request for relief, the U.S. Trade Representative must determine whether the product in question is a perishable agricultural product,

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can be extended once, but the total length of relief cannot exceed eight years. *Id.* § 2253(e)(1)(B).

<sup>183</sup> See *id.* § 2253(c).

<sup>184</sup> *Id.* § 2254(a). The Commission is required to hold a hearing before issuing these reports. See *id.* § 2254(a)(3).

<sup>185</sup> *Id.* § 2254(b).

<sup>186</sup> *Id.* § 2254(b)(1)(A).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* § 2254(b)(1)(A).

<sup>189</sup> *Id.* § 2254(b)(1)(B).

and whether the product is being imported into the United States in such increased quantities as to be, or likely to be, a substantial cause of serious injury or threat of serious injury to the domestic industry.<sup>190</sup> If the Trade Representative makes an affirmative decision on both issues, the ITC begins work on the investigation.

The Commission has two responsibilities after affirmative findings by the Trade Representative: (1) "monitoring and investigating" imports of the product for up to two years and (2) determining whether the domestic industry is suffering or is threatened with serious injury and setting the appropriate level of relief.<sup>191</sup> First, on the twenty-first day after the petition is filed, the Commission must determine on the basis of available information whether increased imports are a substantial cause of serious injury, or threat of serious injury, to the domestic industry.<sup>192</sup> Second, the Commission must find that the serious injury will be difficult to mitigate due to the perishable nature of the product, or that serious injury would not be prevented under a normal escape clause proceeding because of the length of time involved.<sup>193</sup> Third, the Commission must estimate the amount or extent of provisional relief necessary to prevent or remedy the serious injury or threat of serious injury.<sup>194</sup>

All of this information is then put into a report that the Commission sends to the President.<sup>195</sup> The President considers the report and its findings on the appropriate level of relief and, within seven days, makes a decision on granting relief.<sup>196</sup> The provisional relief ordered by the Commission remains in place until the Commission makes a negative determination, the President takes action to increase the duty, the President decides to take no action, or the President decides relief is no longer warranted.<sup>197</sup>

The most significant difference between this section and Regulation 288/82 is the level of detail. The regulations, as described here, are for the most part parallel. The U.S. statute tends to give less discretion to the ITC on the kinds of analysis required and the facts it must consider in an escape clause case. Congress has listed in greater detail what it expects the ITC to consider, how the ITC should consider certain facts and circumstances, and what the ITC's options are in a number of different situations. This is also true of the President's role in this process. Regulation 288/82 tends to leave analysis by the Commission more open, which accounts for

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<sup>190</sup> *Id.* § 2252(d)(1)(A).

<sup>191</sup> *Id.* § 2252(d)(1)(B), (C).

<sup>192</sup> *Id.* § 2252(d)(1)(C).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* § 2252(d)(1)(E).

<sup>195</sup> *Id.* § 2252(d)(1)(F).

<sup>196</sup> *Id.* § 2252(d)(2)(B).

<sup>197</sup> *Id.* § 2252(d)(4)(A).



greater leeway in the decision-making process by the Commission. In addition, the Commission is not compelled to address issues that the ITC must address in order to satisfy Congressional concerns.

#### IV. U.S. Escape Clause Cases

Several recent cases illustrate the application of the escape clause in the United States.

##### *A. Steel Fork Arms*

In a recent case on steel fork arms,<sup>198</sup> the Commission determined that a U.S. industry was not seriously injured or being threatened with serious injury because of imports.<sup>199</sup> In its opinion,<sup>200</sup> the majority noted the three statutory criteria that must be satisfied for the Commission to find that imports were a substantial cause of serious injury, or a threat of serious injury: (1) the imported article under investigation is entering the United States in increased quantities; (2) the domestic industry producing an article like or directly competitive with the imported article is being seriously injured or is threatened with serious injury; and (3) the increased imports are a substantial cause of the serious injury or threat thereof to the domestic industry.<sup>201</sup>

In this case the Commission majority determined that imports increased over the period of investigation but that the domestic industry, while experiencing economic difficulties, was not seriously injured or threatened with serious injury.<sup>202</sup>

The majority began its analysis by defining the relevant domestic industry as those domestic manufacturers who produce an article "like or directly competitive with the imported article."<sup>203</sup> The majority examined the characteristics and uses of the products in question to determine like product, an approach approved by the legislative history.<sup>204</sup>

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<sup>198</sup> Steel Fork Arms, USITC Pub. 1866, Inv. No. TA-201-60 (July 1986) [hereinafter Steel Fork Arms]. Steel fork arms are used on forklift trucks or other heavy material-handling vehicles. *Id.* at 4.

<sup>199</sup> *Id.* The Commission's result was unanimous; however, it submitted majority views and two sets of additional views on the case.

<sup>200</sup> The majority opinion expresses the full views of Vice Chairman Brunsdale and Commissioners Stern, Rohr, and Lodwick. It also expresses the partial views of Chairman Liebele and Commissioner Eckes, who submitted additional views. *Id.* at 3 nn.1-2.

<sup>201</sup> *Id.* at 3 (citing 19 U.S.C. § 2251(b)(1) (1982)).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 4 (citing 19 U.S.C. § 2251(b)(1) (1988)).

<sup>204</sup> The legislative history cited by the Commission states:

[L]ike articles are those which are substantially identical in inherent or intrinsic characteristics (i.e., materials from which made, appearances, quality, texture, etc.), and "directly competitive" articles are those which, although not substantially identical in their inherent or intrinsic characteristics, are substantially equivalent for commercial purposes, that is, are adapted to the same end uses and are essentially interchangeable therefor.

The majority considered the facts about production of, and uses for, steel fork arms and determined that the appropriate like product was all steel fork arms and the appropriate domestic industry was all U.S. producers of steel fork arms.<sup>205</sup> During the period of investigation, steel fork arms were produced in a wide variety of sizes by six producers.<sup>206</sup> The Commission considered only the domestic production of these six producers when evaluating the domestic industry and excluded any foreign production.<sup>207</sup>

The majority then analyzed the case in light of the three criteria enumerated above. The majority quickly determined that imports increased absolutely when measured both by value and quantity.<sup>208</sup> Relative to domestic production, imports also increased dramatically.<sup>209</sup> These facts led the majority to conclude that the requirement of increased imports had been fulfilled.

The second criteria, serious injury or the threat of serious injury to the domestic industry, is more explicitly covered by the statute. The Commission analyzed operating and financial data, as well as conditions in the market for steel fork arms.<sup>210</sup> The majority concluded that the domestic industry was suffering some "economic distress" but was not seriously injured.<sup>211</sup> In addition, the majority

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H.R. Rep. No. 571, 93rd Cong., 1st Sess. 45 (1973); S. Rep. No. 1298, 93rd Cong., 2d Sess. 122 (1974).

<sup>205</sup> See Steel Fork Arms, *supra* note 198, at 4-6.

<sup>206</sup> Two of the six producers, Joseph Dyson & Sons and GCN Inc., produced forklifts for sale commercially. *Id.* at 5. Four producers, Yale Materials Handling Corp., Harlo Products Inc., Clark Material Handling Products Inc., and Hyster Co. manufactured steel fork arms for captive consumption only. *Id.* Of these four, only Yale and Harlo were still producing in 1986, the year the Commission made its determination. *Id.* Two of the six firms (Clark and Hyster) stopped production during the period of investigation, but because they did produce at some point during the five-year investigatory period, the Commission decided to include them in the domestic industry. *Id.*

<sup>207</sup> One of the producers, Dyson, imported steel fork arms from Toyoshima Special Steel Co., Ltd. during the period of investigation and had signed an agreement with Daewoo Heavy Industries to import steel fork arms. *Id.* at 6 n.14. Fork arms from these foreign sources were not included in the consideration of the condition of the domestic industry. See 19 U.S.C. § 2251(b)(3)(A) (1988).

<sup>208</sup> Steel Fork Arms, *supra* note 198, at A-27 to A-28. Trends in imports are generally measured over a five year period in ITC investigations. The increase in volume was 155% and the increase in value was 45% over the period. *Id.* The exact volume and value figures for imports were confidential in this investigation. *Id.* at A-28 n.1.

<sup>209</sup> *Id.* at A-28. Imports increased 95% relative to domestic production over the period. Two of the commissioners, Vice Chairman Brundsdale and Chairman Liebler, voiced opposition to using relative import figures in this section of the Commission's analysis. Chairman Liebler explained her position in her Additional Views. *Id.* at 17-30. See *infra* notes 223-32 and accompanying text.

<sup>210</sup> See Steel Fork Arms, *supra* note 198, at 7-14. The majority noted that the fortunes of the steel fork arm industry were tightly linked to those of the forklift truck industry. See *id.* at 8, n.21. The majority also determined that shipments of steel fork arms mirrored domestic consumption of forklift trucks much more closely than domestic production of forklift trucks, due to the large number of imported forklift trucks entering the country without fork arms. *Id.* at 9.

<sup>211</sup> *Id.* at 7.

determined that the industry was not threatened with serious injury, especially in light of the recent improvement in industry trends.<sup>212</sup>

In its discussion, the majority noted that this industry had suffered during the recession of 1982 to 1983 but had improved markedly thereafter. Overall, for the period between 1981 and 1985, most factors had improved.<sup>213</sup> Production was high in 1981, dropped during the recession of 1982 to 1983, and then increased greatly in 1984 and 1985.<sup>214</sup> Production capacity increased by seven percent during the period of investigation, and although capacity utilization fluctuated during the period, it was roughly the same in 1984 and 1985 as it was in 1981.<sup>215</sup> Inventory levels were low and decreased throughout the period of investigation.<sup>216</sup> Employment and total wages were lower in 1985 than in 1981, even though employment in the industry increased after 1983.<sup>217</sup> The majority was reluctant to consider lower employment as a sign of serious injury; instead, it noted that worker productivity and overtime work at commercial manufacturers explained the overall decline in employment.<sup>218</sup> Financial results showed that the industry as a whole was profitable in 1984 and 1985.<sup>219</sup> Net sales were higher in 1984 and 1985 than in 1981.<sup>220</sup>

The majority determined that these factors showed an industry that had recovered reasonably well from the recession, not one that was seriously injured or threatened with serious injury.<sup>221</sup> Because

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<sup>212</sup> *Id.* at 8. The Commission did not perform separate analyses of serious injury and the threat of serious injury, as was commonly done in a number of other escape clause cases.

<sup>213</sup> *Id.* at 11-13. The industry was shifting increasingly to commercial, instead of captive production. In 1981, captive and open market shipments were roughly equal; by 1985, the majority of shipments were open market. *Id.* at 9-10. One of these open market producers, Dyson, accounted for almost all open market shipments, and was the dominant overall producer in the domestic industry. *Id.* at 9. Thus, data from Dyson tended to have a large impact on industry-wide trends.

<sup>214</sup> See *id.* at 11. Domestic shipment figures closely paralleled production figures. *Id.* at 12. Specific figures on this industry are confidential, because of the dominance of Dyson in the industry.

<sup>215</sup> *Id.* at 11-12.

<sup>216</sup> *Id.* at 13.

<sup>217</sup> *Id.*

<sup>218</sup> That is, following the recession of 1982 to 1983, when sales increased in the steel fork arm industry, manufacturers increased productivity and turned to overtime work instead of hiring more workers.

<sup>219</sup> Steel Fork Arms, *supra* note 198, at 14. The Commission noted that these years were the years of highest import penetration. *Id.*

<sup>220</sup> In the interim, sales dropped significantly in 1982 and 1983. *Id.* Only Yale, Dyson, and GCN submitted financial data to the Commission. *Id.* at 14 n.41.

<sup>221</sup> The majority examined each of the factors mentioned above in some detail. It noted that steel fork arm production, shipments, and inventories improved over the period of investigation. Industry capacity increased and capacity utilization remained constant. Employment declined, but worker productivity doubled over the period (showing that the industry was making effort to increase productivity, not decrease production). Finally, the industry operated at a profit over the last two years of the investigation. *Id.* at 14-15. The majority also considered the allegation that any injury reflected in the agree-

the majority determined that the domestic industry was not seriously injured or threatened with serious injury, it did not address the issue of causation.<sup>222</sup>

The chairman of the agency, Susan Liebeler, presented additional views on the issues of increased imports and serious injury. On the issue of increased imports, Liebeler argued that the "increased quantities" in question must be absolute increases in imports, not just increases in market share.<sup>223</sup> Liebeler agreed with the majority's finding that imports were rising absolutely as measured by value and quantity.<sup>224</sup>

Liebeler then analyzed the serious injury standard in escape clause relief cases. She noted that serious injury is a much stricter standard than material injury, as stated in the legislative history accompanying the statute.<sup>225</sup> She emphasized the deteriorated position in which an industry would have to find itself to qualify as seriously injured under the statute. Finally, she noted that this high standard was consistent with the standard expressed in earlier Commission discussions of serious injury.<sup>226</sup>

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gate industry figures was merely a reflection of mismanagement at Dyson, the largest firm in the industry. Both Commissioners Rohr and Stern attached some weight to this alternative explanation for the difficulties experienced by at least one firm in the industry. *Id.* at 15 n.43.

<sup>222</sup> *Id.* at 15 n.42.

<sup>223</sup> Chairman Liebeler reached this conclusion through a careful analysis of the statute and the legislative history. *See id.* at 18-20. The statute requires the Commission to "determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or threat thereof . . ." 19 U.S.C. § 2251(b)(1) (1988). Liebeler disagreed with the notion, expressed by several of her colleagues, that the requirement for increased imports could be satisfied by examining only the market share of imports. *See Steel Fork Arms, supra* note 198, at 18-20; *see also Carbon and Certain Alloy Steel Products*, USITC Pub. 1553, Inv. No. TA-201-51, at 27-28 (July 1984). Liebeler analyzed the plain meaning of this section and compared this section of the statute to other sections where Congress clearly intended the Commission to examine market share and included language to that effect. She determined that looking at relative increases in imports, measured by market share, did not address the question of increased imports, and therefore the Commission must look at absolute import figures. *See Steel Fork Arms, supra* note 198, at 19-20.

<sup>224</sup> *Steel Fork Arms, supra* note 198, at 21. Measured by volume, imports of steel fork arms increased by 155% from 1981 to 1985. Measured by value, imports also increased, although the figures used to reach that conclusion are confidential. *Id.* at 27 n.24.

<sup>225</sup> In the Senate Finance Committee Report on the Trade Act of 1974, the Committee stated: "As barriers to international trade are lowered, some industries and workers inevitably face serious injury, dislocation and perhaps economic extinction." S. Rep. No. 1298, 93rd Cong., 2d Sess. 119 (1974). Liebeler interpreted this section as defining "serious injury" to mean "a major contraction of a domestic industry or its extinction." *See Steel Fork Arms, supra* note 198, at 24; *see also Nonrubber Footwear*, USITC Pub. 1717, Inv. No. TA-201-55, at 32 (July 1985) (Views of Vice Chairman Liebeler); *Potassium Permanganate*, USITC Pub. 1682, Inv. No. TA-201-54, at 20 (Apr. 1985) (Views of Vice Chairman Liebeler).

<sup>226</sup> In the second case brought under the Act, a commissioner defined serious injury as "an important crippling, or mortal injury, one having permanent or lasting consequences." *See Bolts, Nuts and Screws of Iron or Steel*, USITC Pub. 747, Inv. No. TA-201-2, at 19 (Nov. 1975) (Views of Commissioner George Moore).

Liebeler also determined that the statute required her to focus her inquiry on the factors of production in the domestic industry, not on the providers of labor or capital to the industry under investigation.<sup>227</sup> In her analysis of the domestic industry, Liebeler determined that the industry was not injured.<sup>228</sup> She looked at production which remained constant over the period.<sup>229</sup> Capacity and capacity utilization were also stable throughout the period.<sup>230</sup> Operating income improved in 1984 and 1985.<sup>231</sup> She determined that the data revealed that the industry was not doing extremely well, but it was not suffering material injury.<sup>232</sup>

Another Commissioner, Alfred Eckes, also provided additional views solely on the issue of serious injury. Commissioner Eckes' analysis focused on the dominant producer in the industry, Dyson.<sup>233</sup> He used data from 1981 to 1985, which included an entire business cycle in this industry.<sup>234</sup> He noted that his analysis of the industry's performance in 1984 and 1985 was very important to his decision.<sup>235</sup>

In analyzing whether the domestic industry was suffering serious injury, Commissioner Eckes focused on the three factors enumerated in the statute.<sup>236</sup> Considering productive capacity, he noted that production had fluctuated throughout the period with recent declines due to decreased production by captive manufacturers.<sup>237</sup> He stated that Dyson's production was much higher in 1985 than in the beginning of the investigation.<sup>238</sup> Declines in overall production ca-

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<sup>227</sup> See *Steel Fork Arms*, *supra* note 198, at 24-25.

<sup>228</sup> Liebeler concurred with the majority that the domestic industry consisted of both captive and commercial producers of steel fork arms. She reasoned that "the presence or absence of vertical integration in the fork [lift] truck industry should not affect the merits of the case." *Id.* at 27.

<sup>229</sup> *Id.* at 28.

<sup>230</sup> *Id.*

<sup>231</sup> See *id.* at 29.

<sup>232</sup> *Id.* at 30.

<sup>233</sup> Commissioner Eckes based this approach on comments in the legislative history accompanying the Trade Act of 1974. These comments state that the purpose of this section of the statute is the protection of domestic productive resources involved in the production of the articles under investigation. See H.R. Rep. No. 571, 93rd Cong., 2nd Sess. 46 (1973); S. Rep. No. 1298, 93rd Cong., 2nd Sess. 122 (1974). Because Dyson accounted for most commercial shipments (the growing segment of the market) and because Dyson substantially increased its share of total domestic shipments during the investigation, Commissioner Eckes focused on Dyson's performance in his analysis. See *Steel Fork Arms*, *supra* note 198, at 31-32.

<sup>234</sup> See *Steel Fork Arms*, *supra* note 198, at 32. He noted that consumption of steel fork arms was strong in 1981, declined sharply during the recession of 1982 to 1983, and then bounced back as the economy recovered in 1984 and 1985. *Id.* at 32-33.

<sup>235</sup> *Id.* at 33. He stated that his approach was consistent with that taken by a Commission majority in *Wood Shakes and Shingles*, USITC Pub. 1826, Inv. No. TA-201-56, at 9-12 (Mar. 1986).

<sup>236</sup> Specifically, he looked at significant idling of productive facilities, significant unemployment, and the significant number of domestic firms operating at a reasonable level of profit. *Steel Fork Arms*, *supra* note 198, at 33. See 19 U.S.C. § 2252(c)(1)(A) (1988).

<sup>237</sup> See *Steel Fork Arms*, *supra* note 198, at 33.

<sup>238</sup> *Id.* at 34.

capacity occurred with two plant closings during the period of investigation, which Commissioner Eckes determined did affect the question of serious injury.<sup>239</sup>

Commissioner Eckes also noted that Dyson increased its capacity during the investigation and that overall the capacity utilization rate for the industry was only a few percentage points lower in 1985 than in 1981.<sup>240</sup> Although the number of employees in the industry declined throughout the investigation, the number of employees increased at Dyson. Furthermore, employees at Dyson collected considerable amounts of overtime hours and greatly increased their productivity.<sup>241</sup> Thus, Commissioner Eckes concluded that the evidence on employment was mixed and did not establish serious injury. Finally, operating profits of the producers of a majority of forklifts were positive during 1984 and 1985.<sup>242</sup> Additionally, net sales were greater in 1984 than in 1981.<sup>243</sup> Commissioner Eckes concluded that the steel fork arms industry had participated in the economic recovery of 1984 to 1985, and was not experiencing serious injury.<sup>244</sup>

### B. *Wood Shakes and Shingles*

In *Wood Shakes and Shingles*,<sup>245</sup> the Commission determined that a domestic industry was seriously injured and that imports were a substantial cause of that serious injury.<sup>246</sup> The majority used the same analytical framework as was used in *Steel Fork Arms*,<sup>247</sup> however,

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<sup>239</sup> He noted that one of the plant closings occurred in 1982, which was "remote in time and does not provide much insight into the recent performance of the industry during the market recovery." *Id.* Both Clark and Hyster shut down production because they discovered that purchasing the fork arms would be cheaper than continuing to manufacture them. *Id.* Commissioner Eckes thus attributes these plant closings not to the weakened performance of the industry, but instead to sound business judgment. *Id.*

<sup>240</sup> *Id.* at 35. Commissioner Eckes then examined trends in domestic shipments and inventories. Commercial shipments increased by 16% over the period of investigation, but overall shipments dropped from 1981 to 1985 due to declines in captive shipments. *Id.* Inventories as a ratio of shipments dropped from 1981 to 1985. *Id.*

<sup>241</sup> *Id.* at 35-36.

<sup>242</sup> *Id.* at 36. Indeed, with sales volumes equivalent to 1981, the industry managed to turn operating losses in 1981 into operating profits in 1985. *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 37.

<sup>245</sup> USITC Pub. 1826 Inv. No. TA-201-56 (Mar. 1986) [hereinafter *Wood Shakes and Shingles*].

<sup>246</sup> Four commissioners—Chairman Stern, and Commissioners Eckes, Lodwick, and Rohr—found serious injury to the domestic industry caused by increasing imports in this case. Two commissioners—Vice Chairman Liebler and Commissioner Brunsdale—found no serious injury or threat of serious injury. Commissioners Eckes, Lodwick, and Rohr recommended relief in the form of an increased tariff; Chairman Stern and Commissioner Brunsdale recommended that adjustment assistance be granted to workers and firms in the industry; and Vice Chairman Liebler recommended that no relief be granted. *Id.* at 1.

<sup>247</sup> See *supra* notes 198-244 and accompanying text. The majority stated that the purpose of the escape clause is to "prevent or remedy serious injury to the domestic productive resources which is substantially caused by imports, while facilitating adjustment to

the statutory factors were in greater dispute in this investigation.

Parties to the investigation disagreed about the makeup of the like product and domestic industry categories in this investigation.<sup>248</sup> The petitioner argued that the like product consisted of all wood shakes and shingles, and the domestic industry included all producers of these products.<sup>249</sup> Respondents countered by suggesting four separate like products and domestic industries: western red cedar shakes, western red cedar shingles, remanufactured western red shingles, and northern white cedar shingles.<sup>250</sup> The majority considered the respondent's arguments and rejected them.

According to the majority, the similarities between the various types of shakes and shingles outweighed their differences. First, western red cedar shakes and shingles are manufactured from the same raw material, often at the same facility, and with the same workers.<sup>251</sup> Second, all shakes and all shingles are manufactured in the same manner and with the same equipment.<sup>252</sup> Third, these products are all used for the same application—roofing and covering the exterior of buildings.<sup>253</sup> Finally, consumers appear to choose shakes or shingles for aesthetic and other factors not related to the "inherent characteristics" of shakes or shingles.<sup>254</sup> Because of these strong similarities, the majority determined that wood shakes and shingles comprised the like product, and that the domestic industry consisted

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import competition." See *Wood Shakes and Shingles*, *supra* note 245, at 3 (citing 19 U.S.C. § 2251; H.R. Rep. No. 571, 93rd Cong., 1st Sess. 46 (1973); S. Rep. No. 1298, 93rd Cong., 2d Sess. 119 (1974)).

<sup>248</sup> The majority spent some time outlining the standard for "like" or "directly competitive" products under the escape clause regulations. The majority cited the legislative history on this point:

The words "like" and "directly competitive" . . . are not to be regarded as synonymous or explanatory of each other, but rather to distinguish between "like" articles and articles which, although not "like", are "directly competitive". In such context, "like" articles are those which are substantially identical in inherent or intrinsic characteristics (i.e., materials from which made, appearance, quality, texture, and etc.) and "directly competitive" articles are those which, although not substantially identical in their inherent or intrinsic characteristics, are substantially equivalent for commercial purposes, that is, are adapted to the same uses and are essentially interchangeable therefor.

H.R. Rep. No. 571, 93rd Cong., 1st Sess. 45 (1973); S. Rep. No. 1298, 93rd Cong., 2d Sess. 121-22 (1974).

<sup>249</sup> *Wood Shakes and Shingles*, *supra* note 245, at 2.

<sup>250</sup> *Id.* at 4-5.

<sup>251</sup> *Id.* at 5. Admittedly, shakes and shingles are produced on different machines. Approximately half of the domestic producers manufacture both shakes and shingles. *Id.* at 5-6.

<sup>252</sup> *Id.* at 5. Shingles were manufactured from two materials—northern white cedar and western red cedar. Northern white cedar shingles tend to be manufactured and marketed in the eastern United States, as opposed to western red cedar products, which are manufactured and sold in the western United States. *Id.*

<sup>253</sup> *Id.* at 6.

<sup>254</sup> *Id.*

of all producers of wood shakes and shingles.<sup>255</sup>

Respondents argued that if the Commission found one like product in this investigation, the Commission should broaden the like product category to include other roofing and siding materials, such as asphalt shingles, aluminum siding, clay tiles, and other products.<sup>256</sup> The Commission determined, however, that the significant differences in consumer perception, production processes, and pricing patterns were sufficient to exclude these additional products from the like product and domestic industry definitions.<sup>257</sup>

The majority determined that imports were increasing both absolutely, and in relation to domestic production.<sup>258</sup> Imports of wood shakes and shingles increased by 18% between 1983 and 1984, from 3.8 million squares to 4.5 million squares.<sup>259</sup> The most recent data indicated that imports continued to increase, rising to 3.7 million squares in the first 9 months of 1985 compared with 3.3 million squares for the same period in 1984.<sup>260</sup> The market share of domestic producers over the same period fell from 41.2% to 33.9%, indicating relative increases of imports.<sup>261</sup> Therefore, the first criteria for an affirmative finding was satisfied.

The majority also found serious injury or threat of serious injury.<sup>262</sup> The majority considered data collected over an entire business cycle, from 1978 to 1985, and focused on the period from 1983 to 1985.<sup>263</sup> Between 1983 and 1985, domestic consumption of wood shakes and shingles remained stable.<sup>264</sup> Despite this stability in the market, domestic industry indicators fell during the period. Domestic production, production capacity, employment, and the number of firms in the industry all declined.<sup>265</sup> The available financial data indicated a downturn in the industry's fortunes over the period.<sup>266</sup>

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<sup>255</sup> *Id.* at 4-7.

<sup>256</sup> *Id.* at 6.

<sup>257</sup> *Id.* at 6-7.

<sup>258</sup> *Id.* at 7-8. The majority argued that the increase can be either "actual or relative," citing the legislative history for this section of the statute. *Id.* at 7 (citing S. Rep. No. 1298, 93rd Cong., 2d Sess. 121 (1974)). Vice Chairman Liebel and Commissioner Brunsdale argued that this interpretation was incorrect. See *infra* notes 292-98 and accompanying text.

<sup>259</sup> Wood Shakes and Shingles, *supra* note 245, at 7.

<sup>260</sup> *Id.* at 7-8.

<sup>261</sup> *Id.* at 8. The ratio of imports to domestic production more than doubled, rising from 78.9% in 1978 to 185.9% in 1984. *Id.*

<sup>262</sup> See *id.* at 8-12.

<sup>263</sup> *Id.* at 9.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 10-11. Domestic production fell from 2.7 million squares to 2.4 million squares between 1983 and 1984, and fell again from 1.9 million squares to 1.4 million squares between January to September 1984 and January to September 1985. *Id.* at 10. The number of firms producing wood shakes and shingles dropped from 445 in 1978 to 255 in 1985. *Id.* at 11. Employment in the industry fell from 2,375 to 1,572 between 1983 and the period of January to September 1985. *Id.*

<sup>266</sup> *Id.* at 12; see also *id.* at A-34.



Considering all these industry trends in light of the stable domestic market, the majority determined that the industry was suffering serious injury.

Finally, with regard to the final criteria, the majority determined that increasing imports were a substantial cause of the serious injury suffered by the wood shakes and shingles industry.<sup>267</sup> The majority based this determination on increased imports, decreased domestic production, and stable domestic consumption.<sup>268</sup> The majority determined that no other cause was as great as increased imports in causing the serious injury.<sup>269</sup> The majority considered arguments by the respondents that other factors were responsible for any serious injury suffered by the domestic industry. Respondents alleged that declining sources of western red cedar and changes in demand for the product were responsible for any serious injury to the domestic industry. The majority found that neither of these factors was as significant in explaining the problems of the domestic industry as were increased imports.<sup>270</sup>

Commissioners Eckes, Lodwick, and Rohr recommended that the President impose a tariff of thirty-five percent on wood shakes and shingles imports for five years.<sup>271</sup> The recommendation was based on their judgment that an ad valorem tariff would best mitigate the price declines that imports caused in the domestic mar-

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<sup>267</sup> *Id.* at 13-14. The Commission noted that statutory provisions defined "substantial cause" as "a cause which is important and not less [important] than any other cause." *Id.* at 12 (citing 19 U.S.C. § 2251(b)(4)). The statute instructs the Commission to consider all relevant economic factors when analyzing whether imports are a substantial cause of the serious injury, including "an increase in imports (either actual or relative to domestic production) and a decline in the proportion of the domestic market supplied by domestic producers." 19 U.S.C. § 2251(b)(2)(C) (1988).

<sup>268</sup> Wood Shakes and Shingles, *supra* note 245, at 14. The majority argued that increased imports could be a substantial cause of serious injury at any point in the business cycle, and that a downturn in the business cycle alone would not be one of the factors considered in substantial cause analysis. *See id.* at 13 (citing Unwrought Copper, USITC Pub. 1549, Inv. No. 201-TA-52, at 12, n.31 (July 1984)).

<sup>269</sup> *Id.* at 14-17.

<sup>270</sup> *Id.* Although the majority agreed that in the next century a shortage of western red cedar logs would likely have a serious impact on the domestic industry, it did not believe that the availability of logs was presently a major problem for the domestic industry. *See id.* at 15; *but see id.* at 15 n.48 (Chairman Stern found this already to be a serious problem for the domestic industry).

The Commission also discounted the effect of short-term demand—that is, changes in the demand for wood shakes and shingles caused by changes in the demand for housing. The majority noted that during 1984 and 1985, demand for housing increased, but wood shakes and shingles prices did not increase and the industry's fortunes did not improve. Therefore, changes in short-term demand could not explain the serious injury suffered by the domestic industry. *Id.* at 16-17.

Similarly, the majority determined that long-term demand factors, such as the safety and fire-retardant characteristics of wood shakes and shingles and the availability of price-competitive substitutes, were not as important causes of the serious injury as increased imports. It noted that any shift in demand away from wood shakes and shingles was gradual, and was not particularly significant during the critical 1983 to 1985 period. *Id.* at 17.

<sup>271</sup> *Id.* at 19.

ket.<sup>272</sup> They estimated that a tariff of that magnitude would restore import penetration to historic levels.<sup>273</sup> The Commissioners rejected the use of adjustment assistance, criticizing these programs as "inadequately funded" and "ineffectively administered."<sup>274</sup> The Commissioners also rejected a recommendation to impose quotas in this investigation. While quotas would certainly control the level of imports, the relatively inelastic domestic supply would most likely be unable to respond effectively to a sudden shift in supply.<sup>275</sup>

Chairman Paula Stern disagreed with this remedy.<sup>276</sup> She argued that fundamental structural problems in the industry meant that tariffs would not solve the long-term problems of the industry. Stern pointed to long-term declines in demand, caused by new fire and building codes and an increasingly tight supply of the old-growth red cedar logs which was the raw material used to make the wood shakes and shingles at issue.<sup>277</sup> She argued that wood shakes and shingles producers were facing a number of other causes which made adjustment assistance a more appropriate remedy.<sup>278</sup>

Stern discounted the effectiveness of the remedy recommended by the majority. She argued that the price effect of a tariff would not be sufficient in this case. First, she noted that Canadian producers would pass the price increase along to consumers and would not absorb the increase themselves.<sup>279</sup> Second, because of limits in the change of log prices and the availability of logs, domestic supply elasticity was low, and the domestic producers would not be able to respond quickly to the market opportunities created by higher Canadian prices.<sup>280</sup> Therefore, tariffs would not be particularly helpful in raising prices.<sup>281</sup>

Stern also argued that a tariff would not increase domestic production or employment. First, increased prices for wood shakes and

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<sup>272</sup> The Commissioners noted that increasing prices could have a negative effect on demand for wood shakes and shingles because of competition from other products, such as asphalt shingles and aluminum siding. The Commissioners determined substitutability was not so high as to prevent price increases. *See id.*

<sup>273</sup> *Id.* at 20.

<sup>274</sup> *Id.* at 21 (citing Nonrubber Footwear, USITC Pub. 1717, Inv. No. TA-201-55, at 115 (July 1985) (Views of Chairman Stern, Commissioners Eckes, Lodwick, and Rohr regarding remedy)). The Commissioners noted that the Department of Commerce did not have funding for adjustment assistance at that time, and the Department of Labor only had funding for training and other allowances for a six month period. *See id.* at 21.

<sup>275</sup> *Id.* at 22.

<sup>276</sup> *Id.* at 23-29.

<sup>277</sup> *Id.* at 24-25. Stern noted that the supply of old-growth red cedar logs was sufficient only for the next twenty years. *Id.* at 25. She also argued that U.S. producers realized this fact and their primary objective in this whole process was to gain access to Canadian old-growth red cedar logs. *Id.* at 27.

<sup>278</sup> *Id.* at 23-24.

<sup>279</sup> *Id.* at 31.

<sup>280</sup> *Id.* at 32.

<sup>281</sup> *Id.* at 32 n.23, (citing Memorandum EC-J-114).

shingles would not automatically cause the supply to increase. The raw material, old-growth red cedar, was harvested with a number of other kinds of trees, and the harvest of old-growth red cedar was subordinate to the harvest of these other species.<sup>282</sup> Second, the prices for red cedar were independent of the prices of wood shakes and shingles to a large degree.<sup>283</sup> Third, the wood shakes and shingles industry had a great deal of unused capacity, and there were few barriers to entry in this industry.<sup>284</sup> Finally, there was some evidence that wood shakes and shingles were used on more expensive homes, the demand for which is not price sensitive and is relatively steady. For these reasons, price increases would not be substantial, and they did not automatically translate into increases in production. The Commission staff estimated that the tariff would increase employment by 24 to 183 workers, a number Stern termed "miniscule."

Stern concluded that the only appropriate solution was for firms and workers to begin the process of adjusting to the inevitable loss of their raw material and to begin producing something else. She argued that adjustment assistance was the most appropriate remedy that the government could offer to help the industry, and that the President should implement it in this case.

Vice Chairman Liebler and Commissioner Brunsdale reached a negative determination in the case. They found the same like product and domestic industry as the majority.<sup>285</sup> They also determined that imports had increased and that the domestic industry was seriously injured.<sup>286</sup> These two commissioners did not, however, find a causal relationship between the increased imports and the serious injury suffered by the domestic industry. These commissioners relied on economic analysis to determine the lack of causality.<sup>287</sup> Their analysis focused on the supply and demand factors in the market. They concluded that the demand for the product was relatively more sensitive to price than was the supply of the product.<sup>288</sup> Therefore, changes in the demand for wood shakes and shingles, not increased imports, was the real cause of serious injury to the domestic industry.<sup>289</sup>

First, they examined the like product arguments in this investigation. Looking at the use for shakes and shingles and the character-

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<sup>282</sup> *Id.* at 33. That is, loggers go into an area to harvest a number of different kinds of trees. They seek out species other than red cedar, however, and the demand for red cedar does not drive them into logging.

<sup>283</sup> That is because red cedar has a number of end uses, and wood shakes and shingles is not the most important end use. Other uses drive the price of logs.

<sup>284</sup> Thus, getting price increases to stick is more difficult in this industry.

<sup>285</sup> Wood Shakes and Shingles, *supra* note 245, at 42-44.

<sup>286</sup> *Id.* at 45-54.

<sup>287</sup> *Id.* at 57.

<sup>288</sup> *Id.* at 72.

<sup>289</sup> *Id.* at 72-73.

istics of these products and other roofing materials, they determined that western red cedar and northern white cedar shakes and shingles were like products and that other roofing materials were not like products.<sup>290</sup> Second, they questioned whether the requirement for increased imports could be satisfied by an increase in the relative market share of the imports.<sup>291</sup> Vice Chairman Liebeler argued that, given the legislative history and the plain meaning of the statute, the Commission should only consider absolute increases in imports.<sup>292</sup> Third, looking at the data presented on the industry's condition, they concurred with the majority that the domestic wood shakes and shingles industry was suffering serious injury.<sup>293</sup> Fourth, they analyzed the issue of whether imports were a substantial cause of the serious injury. They stressed the importance of ensuring that imports are "causing" the injury. Merely observing that certain things are occurring in the market at the same time was not enough.<sup>294</sup> They proposed to examine the causal relationship by the use of demand and supply analysis.<sup>295</sup>

The analysis of this market required a look at three components: the domestic demand for wood shakes and shingles, the domestic supply of U.S. producers, and the import supply of foreign producers.<sup>296</sup> Demand examines those factors relating to consumer preferences and economic activity. Supply tends to focus on the state of production technology, the availability of raw materials and labor, the existence of alternative markets, and the distinct advantages of U.S. and foreign producers.<sup>297</sup> These three components determine

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<sup>290</sup> See *id.* at 43-44. Liebeler and Brunsdale noted that wood shakes and wood shingles have the same use as roofing and siding materials, and also have the same characteristics—similar appearance, quality and texture. *Id.* They stated that northern white cedar and red cedar are woods that share a number of characteristics—vertical grain, light weight, strong resistance to rot and insect damage, and good nail-holding qualities. *Id.* Finally, they decided to exclude other materials, such as asphalt and aluminum siding, because these materials were not made from the same raw materials as wood shakes and shingles and thus did not have the same "intrinsic characteristics" as wood shakes and shingles. *Id.* at 44. Because they reached a negative determination under this analysis, which provided petitioners with their greatest opportunity for success on the merits, they did not examine the possibility that these other materials might be directly competitive. Including them within the like product definition would have diluted the petitioners' case and thus would have had no effect on the outcome. *Id.*

<sup>291</sup> *Id.* at 45.

<sup>292</sup> See *id.* at 46-48. Commissioner Brunsdale did not find it necessary to reach the issue in this case, since imports were increasing absolutely and relatively. See *id.* at 46 n.11.

<sup>293</sup> See *id.* at 53-54.

<sup>294</sup> For example, the facts that imports are rising and that the domestic industry is injured do not by themselves reveal a causal relationship. Some effort must be taken to show that the increase in imports was one of the factors that caused the serious injury.

<sup>295</sup> See Wood Shakes and Shingles, *supra* note 245, at 57. For a further elaboration of the model, see *id.* at 81-90.

<sup>296</sup> *Id.* at 57. In some instances, the analysis will require consideration of four components when the demand for the imported and the domestic product is distinct. Such analysis is often referred to as four-curve analysis.

<sup>297</sup> *Id.* at 58.

the price for the good, as well as the quantity produced by manufacturers. Any change in price or quantity can be directly linked to a change in one of these variables.<sup>298</sup> Therefore, Liebeler and Brunsdale argued that everything that affects the domestic industry can be expressed in terms of one of these three components.<sup>299</sup>

Three events involving these components will cause injury to the domestic industry: a decrease in domestic demand, a decline in domestic supply, or an increase in imported supply.<sup>300</sup> By examining the evidence in an investigation and attempting to discern what is happening in the marketplace, the injury can be attributed to one of the three shifts described here. In addition, the causal relationship between the injury sustained and its source can be determined, thus allowing a determination of whether imports are a substantial cause of injury and eliminating some of the guesswork in these investigations.<sup>301</sup> Finally, they concluded that both an increase in foreign supply and a decrease in domestic demand could be linked to the fortunes of the domestic industry.<sup>302</sup>

There are several advantages to this approach. First, it gives the Commission a methodology for determining whether imports are a substantial cause of serious injury, and as great a cause as any other.<sup>303</sup> Second, this methodology uses a great deal of hard data and thereby avoids anecdotal evidence. Third, the approach is predictable and offers a consistent analytical framework for Commission use, allowing parties to understand more clearly the Commission's analysis of these cases. Fourth, the data for this approach are readily available. Finally, Liebeler and Brunsdale claimed that this approach is consistent with "intuitive notions" of causation used by other

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<sup>298</sup> The facts gathered in each investigation will point to factors that affect one of these three components and thus affect the price and quantity. *See id.* at 59.

<sup>299</sup> *Id.* at 61-62.

<sup>300</sup> *Id.* at 62, n.44. For example, a decline in construction and homebuilding will cause a decrease in the demand for wood shakes and shingles, thus injuring the domestic industry. A decrease in production caused by raw material shortages will cause a decrease in domestic supply. Decreased foreign demand or decreased foreign costs will cause an increase in foreign supply. These are three concrete examples of injury caused to the domestic industry, as expressed through these three components of the market. *See id.* at 62-63.

<sup>301</sup> *See id.* at 63-64. Liebeler and Brunsdale also noted that this approach is supported by legislative history for the escape clause. The legislative history states:

The existence of any of these factors such as the growth in inventory would not in itself be relevant to the threat of injury from imports if it resulted from conditions unrelated to imports. Such conditions could arise from a variety of other causes, such as changes in technology or consumer tastes, domestic competition from substitute products, plant obsolescence, or poor management.

S. Rep. No. 1298, 93rd Cong., 2d Sess. 120 (1974).

<sup>302</sup> If the cause of serious injury is related to a decrease in domestic supply or a decrease in demand accompanied by an increase in imports, then imports are not the substantial cause of serious injury, but an effect that accompanies the shift in domestic demand or supply.

<sup>303</sup> Wood Shakes and Shingles, *supra* note 245, at 65.

Commissioners.<sup>304</sup>

Applying this methodology, Liebler and Brunsdale discovered two facts that stood out in the investigation. First, demand was declining in the domestic market.<sup>305</sup> They also noted that imports from Canada increased by a similar amount over the same period.<sup>306</sup> Both factors had the potential for causing harm to the domestic industry, so the Commissioners had to determine which of these factors was more substantial in causing the injury. Liebler and Brunsdale believed that because import supply is relatively insensitive to changes in price, an increase in the supply of imports would have the effect of increasing consumption with very little price effect.<sup>307</sup> Because domestic demand is relatively price sensitive, while supply is relatively insensitive to price, the market price will decline dramatically when demand falls.<sup>308</sup> This decline caused the adverse impact on the domestic industry in this case. Thus, they concluded that there was no injury or threat of injury cause by imports in this investigation.<sup>309</sup>

In terms of remedy, Brunsdale and Liebler noted that the purpose of escape clause relief is either to "facilitate a 'more orderly' transfer of resources out of the industry"<sup>310</sup> or to allow the industry time to adjust and to compete more effectively against foreign competition.<sup>311</sup> First, they noted that neither a thirty-five percent tariff nor import quotas would do much to help the domestic industry adjust.<sup>312</sup> They then examined adjustment assistance, and Commissioner Brunsdale agreed with Chairman Stern that adjustment assistance was the appropriate remedy.<sup>313</sup> Vice Chairman Liebler, however, believed that none of the remedies available would be effective, and that no remedy should be provided.<sup>314</sup>

Ultimately, the President decided that relief for the wood shakes and shingles producers was in the national economic interest.<sup>315</sup> He recommended an increase in the tariff on imports of wood shakes

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<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 67-68. They noted that domestic consumption was 20% lower in 1984 and 1985 than in 1978, and was at the same level as domestic consumption in 1980.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 69-71.

<sup>308</sup> *Id.* at 72.

<sup>309</sup> *Id.* at 73.

<sup>310</sup> *Id.* at 75. They argued that the purpose of relief in this case is to allow an orderly adjustment so that firms' contract and economic resources—labor and capital—were put to productive use in other areas with minimal amounts of pain and dislocation.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* at 76-79. Chairman Stern reached the same conclusion through analysis of the nature of the industry. See *supra* notes 279-84 and accompanying text.

<sup>313</sup> Wood Shakes Shingles, *supra* note 245, at 79.

<sup>314</sup> *Id.* at 79-80. Vice Chairman Liebler did prefer adjustment assistance to tariffs. *Id.* at 80.

<sup>315</sup> See Temporary Duty Increase on the Importation Into the United States of Wood Shingles and Shakes of Western Red Cedar, Proclamation No. 5498, 3 C.F.R. 85-86

and shingles for five years.<sup>316</sup> For the first thirty months, the tariff rate would be thirty-five percent.<sup>317</sup> For the next twenty-four months, the increased tariff rate would be twenty percent, and for the final eighteen months, the increased tariff rate would be eight percent.<sup>318</sup> At the same time, the President requested advice from the Commission on the probable economic impact of termination of relief after the tariff had been in place for thirty months.<sup>319</sup>

### 1. Section 203 Investigation

As requested, the Commission initiated an investigation into the probable economic effect on the domestic industry of termination of relief in this case.<sup>320</sup> The Commission investigated and made its recommendations to the President. As in the original case, the Commission did not agree on its advice. Acting Chairwoman Brunsdale and Commissioners Cass and Liebeler concluded that the tariff had not been effective in improving the competitive position of the domestic wood shakes and shingles industry. Also, the main effect of the tariff had been to increase prices at the expense of the consumer and to the benefit of producers without any improvement in the domestic industry's ability to compete.<sup>321</sup>

Brunsdale, Cass, and Liebeler argued that the statute required them to consider the effect of termination on four discrete groups: the domestic industry producing the like product, the communities and other industries most closely affiliated with the industry seeking or receiving relief, U.S. consumers, and industries affected indirectly by the decision on relief and other general national and international economic interests.<sup>322</sup> They concluded that, with the exception of consumers, who were greatly disadvantaged by the continuation of relief, the evidence was mixed. Therefore, they recommended that

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(1986). See also Memorandum from the United States Trade Representative, Western Red Cedar Shakes and Shingles Import Relief Determination, 51 Fed. Reg. 19,157 (1986).

<sup>316</sup> 3 C.F.R. at 86.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> He noted that if general market conditions warrant the continued imposition of relief, and if the domestic producers have begun to make reasonable progress toward adjustment, relief should be continued for the entire five-year period. 51 Fed. Reg. 19,157 (1986).

<sup>320</sup> See Western Red Cedar Shakes and Shingles, USITC Pub. 2131, Inv. No. TA-203-18 (Oct. 1988) [hereinafter Western Red Cedar Shakes and Shingles] (citing letter from Ambassador Yeutter to Acting Chairman Alfred Eckes, dated June 29, 1988). The Commission issued a public notice initiating the investigation on July 20, 1988. See Wood Shakes and Shingles, 53 Fed. Reg. 27,410 (July 20, 1988). A public hearing was held on August 16, 1988, and the Commission announced its advice on October 6, 1988.

As noted by Commissioners Brunsdale, Cass, and Liebeler, the point of comparison is the difference between no tariff and a 20% tariff, since that was the scheduled rate on the date in question. See Western Red Cedar Shakes and Shingles, *supra*, at 5-6.

<sup>321</sup> See Western Red Cedar Shakes and Shingles, *supra* note 320, at 30-31.

<sup>322</sup> *Id.* at 6.

the President terminate the tariff.<sup>323</sup>

They argued that while terminating relief would have an adverse effect on the domestic industry, continuing relief would not support adjustment efforts by domestic industry. To date, the benefits of the increased tariff had flowed primarily to timber owners and the producers of red cedar logs.<sup>324</sup> They noted that the industry had done very little to adjust to imports over the past two years, and, in fact, very little could be done to adjust to import competition without increasing the availability of old-growth western red cedar logs.<sup>325</sup> Finally, they argued that lower-priced imports would harm mainly the suppliers of western red cedar logs and the timber owners, as prices were driven down in the U.S. market.<sup>326</sup> Thus, they argued that continuing the tariff would serve little purpose in assisting the domestic wood shakes and shingles producers.

Second, these Commissioners concluded that a change in the tariff would have little adverse effect on the communities in which the industry is concentrated or on affiliated industries.<sup>327</sup> Measured by sale, employment, or profits, this industry was small when compared with the economy of the two states in which it is concentrated.<sup>328</sup> Related industries, such as housing construction and those industries which use western red cedar, were more significant parts of the economy and should benefit from a reduction in the tariff.<sup>329</sup>

Third, they argued that consumers would benefit dramatically if the tariff were removed. They noted that the Commission staff estimated that eliminating the tariff, rather than reducing it to 20%, would save U.S. consumers an estimated \$10 to \$20 million.<sup>330</sup> Fi-

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<sup>323</sup> *Id.* at 7-8.

<sup>324</sup> As noted in the opinion, 80% of the price increase in wood shakes and shingles was reflected in higher log prices, and did not result in increased benefits for the domestic industry. *Id.*

<sup>325</sup> *Id.* at 7. As noted, no other wood duplicates the qualities of old-growth western red cedar—in terms of weathering, insect resistance, aesthetic, and nail-holding qualities. *Id.* at 10. As old-growth western red cedar stocks in the United States have been depleted, the trees available for harvest are found interspersed among other hardwoods. Thus, loggers primarily go after these other hardwoods, with the hunt for red cedar being a secondary consideration.

Because of this limited supply of cedar logs, the volume of domestic production has not responded to the price increase prompted by the increased price of Canadian wood shakes and shingles. Instead, the domestic producers have also increased their price, although evidence indicates that most of this price increase was absorbed by the increased price of red cedar logs. *Id.* at 12-13.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 22.

<sup>328</sup> *Id.* The two states are Washington and Oregon. Even in the specific communities in which production facilities are located, producers are not the most significant employers. *Id.* at 23.

<sup>329</sup> Cheaper wood shakes and shingles should help the housing industry. Lower prices for western red cedar logs should assist the other industries. *Id.* at 23.

<sup>330</sup> *Id.* at 24 (citing appendix at A-37).



nally, they contended that removal of the tariff would benefit the overall economic interests of the United States in several ways. Removal would cause the Canadians to drop the retaliatory tariff put in place against a number of U.S. products as compensation for the tariff on wood shakes and shingles.<sup>331</sup> The Canadians had placed a number of new restrictions on the export of western red cedar logs, which limited exports to the United States.<sup>332</sup> While the evidence on whether the Canadians would relax rules on exports was mixed, there was at least some hope of greater imports of logs if the tariff on Canadian wood shakes and shingles were removed.<sup>333</sup>

Commissioners Eckes, Lodwick, and Rohr concluded that "market conditions do not warrant a departure from the President's program of import relief."<sup>334</sup> They analyzed the current state of the domestic industry and determined that the domestic industry had improved during the period of import relief, but still exhibited signs of weakness.<sup>335</sup> They studied the efforts of U.S. producers to adjust to import competition and concluded that they had made "reasonable progress" in adjusting to import competition during this period.<sup>336</sup> Finally, they studied the probable economic effect of terminating relief and concluded that if relief were terminated, "the effect on the domestic industry could be devastating."<sup>337</sup>

In their examination of the current condition of the domestic industry, they noted that production had increased through most of the period of investigation with a slight decline in interim 1988.<sup>338</sup> Capacity increased between 1985 and 1987, and then remained steady through 1988.<sup>339</sup> Capacity utilization followed a similar trend, although it declined slightly in interim 1988.<sup>340</sup> Domestic producers were highly profitable from 1986 through interim 1988, and prices for wood shakes and shingles increased throughout the period.<sup>341</sup>

The Commissioners noted a number of efforts on the part of the

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<sup>331</sup> *Id.* at 26-27. The retaliatory tariffs were placed on certain books, catalogs of publications issued by non-Canadian publishers, printed music, computer parts, semiconductor devices, tea bags, diesel motor rail cars, oatmeal and rolled oats, trees, cider, asphalt paving oil, and ozone generators. *See id.* at 26, n.53, (citing appendix at A-43).

<sup>332</sup> *Id.* at 28.

<sup>333</sup> *See id.* at 28-30.

<sup>334</sup> *Id.* at 41. Commissioner Lodwick reached the further conclusion that terminating import relief would have an adverse effect on the domestic industry. *Id.* at 41 n.29.

<sup>335</sup> *Id.* at 34.

<sup>336</sup> *Id.* at 36-37.

<sup>337</sup> *Id.* at 40.

<sup>338</sup> Specifically, production was 1.6 million squares in 1985, 2.1 million squares in 1986, and 2.2 million squares in 1987. *Id.* at 35 (citing appendix at A-7). In interim 1987, production was 1.1 million squares, compared with 1.05 million squares in interim 1988. *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.* at 35-36.

domestic industry to adjust to import competition. Producers invested in new equipment, such as automatic shake saws and new shingle machines, to increase productivity and allow use of a lower grade of western red cedar.<sup>342</sup> They also invested in equipment that allowed them to use more efficiently the available supply of western red cedar.<sup>343</sup> Finally, the industry was undertaking a number of research projects designed to expand the raw material sources for wood shakes and shingles.<sup>344</sup>

Finally, these Commissioners concluded that "there is no reason to believe that imports would not increase to their pre-relief levels" if relief were terminated.<sup>345</sup> They noted that the Canadian industry was large and had the ability to respond quickly to the reduction of tariffs that were harming it.<sup>346</sup> They argued that a number of factors, such as a Canadian loggers' strike, a strong Canadian dollar, and strong cyclical demand for shakes and shingles, currently favored the domestic industry.<sup>347</sup> Any change in these factors, however, would prove quite serious and potentially devastating for the domestic industry. They therefore concluded that the relief should remain in the staged form as presently planned.

The President agreed to keep tariffs in place, although he accelerated the tariff rate reductions.<sup>348</sup> The tariff would be twenty percent for one year, ten percent for the next year, and five percent for the final six months.<sup>349</sup> Based on the Commission report and advice from the Secretaries of Labor and Commerce, he determined that it was in the national interest to accelerate the reduction of duties because of the burden on consumers and the increased use of nonwood roofing materials.<sup>350</sup>

The value of these opinions lies in the method of discussion by the Commission. The outstanding issues in the application of the escape clause legislation are discussed in the majority, in the dissents, and in additional views. Arguments are outlined and explained based on legal precedent and other forms of analysis, including economic analysis. The existence of this type of opinion allows the reader to discover controversial areas, such as the ability to find the causal link between imports and serious injury to the do-

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<sup>342</sup> *Id.* at 37.

<sup>343</sup> *See id.* at 37-38. These new machines included new shake splitters, new log decks, and wood chippers. *Id.*

<sup>344</sup> *Id.* at 38-39.

<sup>345</sup> *Id.* at 39.

<sup>346</sup> *Id.* at 39-40.

<sup>347</sup> *Id.* at 40.

<sup>348</sup> *See* To Modify the Import Relief on Western Red Cedar Shakes and Shingles, Proclamation No. 5925, 3 C.F.R. 542 (1988). The prior schedule had been a 20% tariff in place from December 7, 1988, through December 6, 1990, and an 8% tariff from December 7, 1990, through June 6, 1991. *See supra* notes 315-18 and accompanying text.

<sup>349</sup> 3 C.F.R. at 544.

<sup>350</sup> *Id.* at 543.

mestic industry. The reader can find different methods for finding this causal link in the different parts of the opinions, and thus the reader can focus on specific controversies, whereas EEC opinions give the reader no indication of the areas of greatest concern to the Commission.

## V. Comparison of Provisions

Both the European and the U.S. systems have features that improve their effectiveness and help them keep domestic industries and trading partners satisfied. The desirable European features tend to emphasize the political nature of these cases. The U.S. strengths are in the areas of analysis and the development of theories of law to explain decisions that are made.

### A. *Surveillance by the Europeans*

The strongest unique feature of the European system is the use of surveillance.<sup>351</sup> This outcome provides the Europeans with a handy intermediate step that avoids the harshness of economic sanctions but provides the domestic industry concerned with an effective remedy from increasingly injurious imports. This remedy has a great deal of political expediency to it. It provides a strong signal to importing countries that they are causing some dislocation in the EEC and that they need to be judicious in importing that product if they want to avoid harsher sanctions on that particular item. It allows the Europeans to avoid alienating their trading partners by using a more subtle approach in their international economic relations. The Europeans thus can benefit from reduced imports without raising any tensions with their trading partners. The United States has no such step; any U.S. relief that is granted has a significant effect on the importers involved. The United States has no mechanism for placating domestic industry that does not penalize importers.

Surveillance may be more appropriate in threat cases. This method allows the Europeans to monitor closely industries that may be experiencing increasing competition from imports.<sup>352</sup> Because implementing surveillance is not by itself a very dramatic step, it allows the Europeans to adopt this measure early on, before a domestic industry experiences a great deal of harm. Thus, because of the milder nature of surveillance, in practice the Europeans can survey more products than those the United States places sanctions against. It may also be a more appropriate solution in threat cases where it is less clear that companies need relief from imports to survive. Finally, monitoring import trends assists authorities in gathering and

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<sup>351</sup> See *supra* notes 29-42 and accompanying text.

<sup>352</sup> Surveillance data is collected monthly or quarterly.

publishing data so that a more accurate picture of the industry and domestic consumption can be gathered to watch the health of the domestic industry. This provision is one that has clear benefits and should be adopted by the United States. It would help the United States avoid some of the trade tension that has been rising as the United States seeks to control imports and open markets. It has certainly afforded the Europeans the opportunity to avoid trade cases and seek a lower pressure solution to the trade problems caused by rising imports.<sup>353</sup>

### *B. Trade Regulations as Political Compromises*

The European Community, with its diverse interests and populations, has a strong need for solutions that satisfy diverse interests. The use of escape clause regulations illustrates this point.

Surveillance is a politically expedient solution in the case where diverse interests cannot agree on whether sanctions that invariably will help and hurt different groups should be implemented. Surveillance can be viewed as a consensus-maintaining tool—a way to give members of a coalition a bonus so that they will remain in the coalition and support other goals. Surveillance gives these members a sense of satisfaction on a matter of some importance for them but of lesser importance for other members, while not penalizing less-interested members with sanctions that would affect their consumers.

The surveillance mechanism could assist the escape clause process in the United States by allowing policymakers to avoid reaching impasses over escape clause cases when differing interests present themselves in cases. Often, to avoid upsetting a particular constituency or hurting consumers, relief is not granted because the measures available are too harsh. Surveillance gives policymakers the opportunity to please different constituencies without causing extreme dislocation in the process. It provides a safety valve in the system without creating a great deal of tension.

The example of surveillance illustrates the fact that escape clause relief serves a largely political role to assist domestic industries caught in a cycle of increasing imports. The rationale of adjustment to lowering tariff rates in escape clause cases no longer applies. The fact that escape clause relief serves a largely political role makes a variety of responses desirable. Relief that helps some constituencies without hurting others is necessary in some cases and makes remedies like surveillance very desirable.

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<sup>353</sup> The number of escape clause cases has been significantly lower in Europe. Since Regulation 288/82 has been in effect, six cases have been filed in the EEC, versus fifteen during the same period in the United States.

*C. Analysis in Opinions*

As a system more bound to legal precedent, the U.S. system consists of opinions that consistently go into greater detail and make more of an effort to use economic analysis and promote a legal framework for uniting decisions in a consistent framework than do the decisions of the EEC. On a very basic level, the U.S. decisions are longer, go into greater detail, and contain dissents and additional views that explain points of controversy in interpreting the law. The public gets an idea of current controversies in the approaches and methodologies used to interpret data and escape clause law. Dissents and additional views allow for the development of new legal theories, providing a "laboratory" for new proposals in the development of escape clause laws.

EEC cases tend to rely very heavily on analysis of business and financial trends, without much reference to economic analysis or legal precedent. EEC cases also explain very little and do not elaborate on in-depth discussions held by the Commission in its efforts to resolve the safeguard cases brought before it.

*D. Statutory Direction*

The regulations in the EEC give much less direction to the Commission than is provided to the ITC by the U.S. trade statutes.<sup>354</sup> These provisions indicate the amount of fine tuning done by the U.S. Congress to improve the coverage of the statute and increase the amount of protection afforded to domestic producers. Congress has, in essence, attempted to close "loopholes" and respond to pressure from domestic constituencies.<sup>355</sup>

This has not happened in the EEC. The regulation remains relatively untouched since its enactment in 1982. The only major amendment to this regulation was a provision designed to limit the ability of individual member states to implement protective legislation without going through the EEC Commission. Thus, the EEC has resisted the temptation to alter the regulations to create greater protection for its industries, in part because of the protection already there, and in part because domestic political constituencies are currently satisfied with the regulations.

*E. Remedies*

One area where the U.S. system is superior is in the development of remedies to assist domestic industries. EEC regulations

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<sup>354</sup> Compare Regulation 288/82, *supra* note 12, art. 9 with 19 U.S.C. § 2251(b)(2)(A) (1988).

<sup>355</sup> This trend is especially pronounced in the 1988 Act. See notes 156-71 and accompanying text.

leave the question open.<sup>356</sup> On the other hand, the United States has specified eight kinds of remedies in these cases.<sup>357</sup> The U.S. system is preferable because parties know before filing a case which remedies are available and can determine whether an appropriate remedy exists for their alleged injury.

#### *F. Private Parties*

Although the U.S. Government and other public bodies can file escape clause cases, the burden is usually carried by private parties with an extreme interest in the outcome of the case. Conversely, in Europe, Member States are responsible for initiating a case and provide a substantial amount of the information. Private parties are involved in the EEC, but to a much lesser extent than in the United States. The U.S. system is more responsive to the affected industry since more acutely interested private parties are responsible for providing information and arguments to the decisionmaking body.

### **VI. Conclusion**

There are a number of differences between the European and the U.S. system. Certain provisions from each system have advantages that should be employed by both. The Europeans enjoy the understanding that this process is primarily a political mechanism and an opportunity for satisfying domestic industry demands to restrict imports. The European system has the advantage of flexibility, both in its ability to apply the intermediate option of surveillance, and in its informal procedures, which result from a broadly sketched set of regulations. The U.S. system has the advantage of openness. Remedies are listed for the parties to examine and determine their usefulness. Issues of contention are presented to the public in the opinions drafted by the ITC. In addition, private parties with an acute interest in the proceeding are normally the parties responsible for presenting evidence and arguing before the decisionmaker. Both systems have their strengths, and when opportunities for revision of the escape clause legislation occur, lawmakers should consider incorporating the strengths of the other system.

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<sup>356</sup> See Regulation 288/82, *supra* note 12, art. 15, para. 2.

<sup>357</sup> See 19 U.S.C. § 2253(a)(3) (1988).

